TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 250.

ELLERY J. GARFIELD AND GEORGE M. WHEELER, PLAINTIFFS IN ERROR,

vs.

SHERMAN PARIS, MARSHALL J. ALLEN, GEORGE H. ALLEN, AND AUGUSTUS S. PYATT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 18, 1875.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the eastern district of Michigan, before you, in a suit between Sherman Paris, Marshal J. Allen, George H. Allen, and Augustus S. Pyatt, as plaintiffs, and Ellery I. Garfield and George M. Wheeler, as defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint doth appear: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do
2 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 28th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] ADDISON MANDELL, *Clerk.*

Allowed, Dec. 28th, 1874, by

JNO. W. LONGYEAR,
District Judge.

3, 4 (Indorsed:) Circuit court of the United States for the eastern district of Michigan. Sherman Paris et al. vs. Ellery I. Garfield & George M. Wheeler. Writ of error. Filed in clerk's office Dec. 28, 1874. A. Mandell, clerk.

5 THE UNITED STATES OF AMERICA:

To Sherman Paris, Marshal J. Allen, George H. Allen, and Augustus S. Pyatt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan at Detroit, in said district, wherein Ellery I. Garfield and George M. Wheeler are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

6 Witness the Hon. John W. Longyear, judge of the circuit court of the United States for the eastern district of Michigan, this 28th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

JNO. W. LONGYEAR,
District Judge.

7,8 (Indorsed:) In the circuit court U. S. eastern district of Michigan. Sherman Paris et al. vs. Ellery I. Garfield & George M. Wheeler. Citation & proof of service. Filed in clerk's office Dec. 29, 1874. A. Mandell, cl'k.

I accept service of within citation for the defendants in error. Dec. 29th, 1874.

DON M. DICKINSON,
Attorney for Def'ts in Error.

9 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan, at the district court-room in the city of Detroit, of the term of November, in the year one thousand eight hundred and seventy-four.

IN THE CASE BETWEEN SHERMAN PARIS, MARshall J. Allen, George H. Allen, & Augustus S. Pyatt, plaintiffs, and Ellery I. Garfield and George M. Wheeler, defendants.

Be it remembered that on the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-four, the said plaintiffs, by Don M. Dickinson, their attorney, came into the court aforesaid, before the judges thereof, and filed their declaration against the said defendants, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michigan. Of the June term, A. D. 1874.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Sherman Paris, Marshall J. Allen, George H. Allen, & Augustus S. Pyatt, who are partners in trade, doing business under the name and style of Paris, Allen & Co., who are citizens of the State of New
10 York, by Don M. Dickinson, their attorney, filing this their declaration as commencement of suit, complain of Ellery I. Garfield and George M. Wheeler, who are partners in trade under the name and style of Wheeler & Garfield, who reside in the city of Detroit, in the eastern district of Michigan, and who are citizens of the State of Michigan, of a plea of trespass on the case upon promises.

For that whereas the said defendants, on the 28th day of September, A. D. 1874, at Detroit, in said district, were indebted to the plaintiffs in the sum of ten thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiffs to the defendants, at their request;

And in a like sum, for the price and value of work then and there done, and materials for the same provided by the plaintiffs for the defendants, at their request;

And in a like sum, for money then and there lent by the plaintiffs to the defendants, at their request;

And in a like sum, for money then and there paid by the plaintiffs to the defendants, at their request;

And in a like sum, for money then and there received by the defendants for the use of the plaintiffs;

And in a like sum of money then and there found to be due from the defendants to the plaintiffs, on an account stated between them.

And thereupon the said defendants afterwards, and on the day and year and at the place aforesaid, in consideration of the premises, respectively, then and there promised the said plaintiffs to pay them the
11 said several last-mentioned moneys, respectively, on request. Yet they have disregarded their promises and have not paid any of the said moneys, or any part thereof, although often requested so to do, to the plaintiffs' damage of ten thousand dollars; and therefore they bring suit, etc.

DON M. DICKINSON,
Plaintiffs' Attorney.

Upon the filing of which said declaration, the following rule to plead was entered by said plaintiffs, to wit:

Rule to plead.

SHERMAN PARIS, MARSHALL J. ALLEN, GEORGE H. Allen, and Augustus S. Pyatt,
vs.
ELLERY I. GARFIELD & GEORGE M. WHEELER.

On filing declaration in this cause, as commencement of suit, and on motion of Don M. Dickinson, attorney for plaintiffs, it is ordered that said defendants appear and plead to said declaration within twenty days after service on them of a copy thereof, and notice of this rule or judgment, &c.

DON M. DICKINSON,
Def'ts' Att'y.

Afterwards, to wit, on the third day of October, 1874, the said plaintiffs, by their said attorney, came into the court aforesaid and filed their bill of particulars in the words and figures following, to wit:

12 *Bill of particulars.*

Copy A.

NEW YORK, *Nov.* 24, 1873.

Mess'rs Wheeler & Garfield bo't of Paris, Allen & Co., importers of brandies, gins, wines, &c., 51 Broadway. Terms, note 4 months, with exchange on New York or % off for cash.

Duplicate.

5 bbls. Old Crow whiskey—205–11—194	4 00	776
15 " Oakland whiskey—613–7½—605½	2 00	1,211
1 " 12½ bay rum—48–1½—46½, gold	2 50	116 25
Premium on $116.25, gold @	10	11 62
Bbl., 1.50; c't ge, 3.75		5 25
		2,120 12

Copy B.

NEW YORK, *Dec.* 15, 1873.

Mess' Wheeler & Garfield bo't of Paris, Allen & Co., importers of brandies, gins, wines, &c., 51 Broadway. Terms, note 4 months, with exchange on New York, or % off for cash.

Duplicate.

	¼ c'sk A. M. & Co. brandy, Manderstrom, ⅝ 1983—44-2—42, gold	6 00	252	
13	¼ " O. D. & Co., brandy, Albert the Good, ⅝ 288—43-2—41, "	4 00	164	
	¼ " Pemartin sherry—34-2—32	" 5 10	163	20
	¼ " Pemartin sherry—33½-2—31½	" 3 00	94	50
	¼ " Light-house gin, Castor, 1373—42-2—40	" 3 00	120	
	¼ " Sandeman port—35½-2½—33	" 5 00	165	
Shipped from Kentucky: 10 bbls. Old Crow whiskey—419½-32½—387		2 50	976	50
Premium on $958.70 gold, @		10	95	87
C't'ge			1	50
			2,023	57

Circuit court of the United States for the eastern district of Michigan.

SHERMAN PARIS, MARSHALL J. ALLEN, George H. Allen & Augustus S. Pyatt
vs.
ELLERY J. GARFIELD & GEORGE M. Wheeler.

You will please take notice that the two accounts marked "A" & "B," copies of which are hereto attached, constitute the sole bill of particulars of plaintiffs' demand, and for the recovery of which this action is brought.

Dated Oct. 3d, A. D. 1873.

Yours, &c.,

DON M. DICKINSON,
Pl'ffs' Att'y.

To Mess'rs D. B. & H. M. DUFFIELD,
Att'ys for Def'ts.

14 *Proof of service of narr.*

STATE OF MICHIGAN,
County of Wayne, City of Detroit, ss:

Waller S. Clay, being duly sworn, deposes and says that on the third day of October, 1874, he served a notice, of which the within is a true copy, on Mess'rs D. B. & H. M. Duffield, attorneys for the defendants in the above-entitled cause, by handing same to D. B. Duffield, one of above attorneys.

W. S. CLAY.

Subscribed and sworn to before me this third day of October, A. D. 1874.

GEO. L. NORDOLLECK,
Notary Public Wayne County, Michigan.

Afterwards the marshal for said district, to wit, on the 5th day of said October, came into court & filed proof of service of said declaration, in the words and figures following, to wit:

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 29th day of September, A. D. 1874, I served the within narr. upon Ellery I. Garfield and George M. Wheeler, the within named defendants, by delivering to them personally at Detroit, in said district, a true copy thereof, with like notice endorsed thereon as is hereon endorsed.

JOSEPH R. BENNET,
U. S. Marshal,
By D. D. MARSHALL, *Deputy.*

Fees: Service, 4.00; 2 copies, 1.00—$5.00.

15 Afterwards, to wit, on the 6th day of October, A. D. 1874, the said defendants came into the court aforesaid, by D. B. & H. M. Duffield, their attorneys, and filed in said court their plea & notice, in the words & figures following, to wit:

Plea and notice.

In the circuit court of the United States for the eastern district of Michigan.

SHERMAN PARIS, MARSHALL J. ALLEN, George H. Allen & Augustus S. Pyatt
vs.
ELLERY I. GARFIELD AND GEORGE M. Wheeler.

And now come the said defendants, by D. B. & H. M. Duffield, their attorneys, and demand a trial of the matters set forth in the plaintiffs' declaration.

D. B. & H. M. DUFFIELD,
Def'ts' Att'ys.

SIR: Please take notice that upon the trial of this cause the defendants, under the plea above pleaded, will give in evidence and insist in their defence that the cause of action of said plaintiff' in this suit, if any they have, is founded solely upon the sale or sales of intoxicating or spirituous liquors within the provisions of an act of the people of the State of Michigan, entitled "An act to prevent the manufacture and sale of spirituous or intoxicating liquors as a beverage," approved
16 Feb'y 3d, 1855, and the acts amendatory thereto.

Yours, &c.,

D. B. & H. M. DUFFIELD,
Att'ys for Def'ts.

To DON M. DICKINSON,
Pl'ffs' Att'y.

Venire.

Thereupon, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiffs as the said defendants have put themselves on that jury.

Verdict.

And the jurors of that jury, of whom mention is made, to wit, Albert B. Slocum, James H. Starkweather, Joseph B. Gale, Charles W. Lang, Perry Knapp, Seymour Finney, David Devee, Stephen Whittier, Robert

Carnes, William U. Thayer, William D. Wilkins, and John Winder, who were on the twenty-first day of November, A. D. 1874, elected, tried, and sworn well and truly to try the issue joined in this case, and after hearing the evidence adduced, the arguments of counsel, and receiving the charge of the court, retired to their room to consult of their verdict, under charge of an officer sworn to attend them, and after a short absence returned into court, and say upon their oaths that said defendants did undertake and promise in manner and form as the said plaintiffs have in their said declaration declared against them, and the said jurors assess the damages of the said plaintiffs against the said defendants on occasion thereof at the sum of four thousand three hundred and twenty-six dollars and thirty-five cents.

17 *Judgment.*

It is therefore considered by the court now here, that the said plaintiffs do recover against the said defendants the said sum of four thousand three hundred and twenty-six dollars and thirty-five cents ($4,326.35) damages, assessed as aforesaid, together with said plaintiffs' costs of this suit, to be taxed, &c.

And the jurors aforesaid, upon their oaths aforesaid, in answer to certain questions propounded to them in writing, by and on behalf of defendants, find as follows, to wit:

As to the first question of said defendants, to wit: 1st. Was there any memorandum in writing for the purchase of these goods signed by Wheeler, in New York? They answer as follows: "There was not."

As to the second question of said defendants, to wit: 2d. Was there any receipt and acceptance in New York of part of the goods sold? If so, what were so received? They answer as follows: "There was, to wit, certain labels."

As to the third question of said defendants, to wit: 3d. Was there any part-payment of the price or earnest-money paid in New York? If so, what amount, and by whom? They answer as follows: "None."

As to the fourth question of said defendants, to wit: 4th. Where were the liquors received and accepted by the defendants? They answer as follows: "In New York."

18 As to the fifth question of said defendants, to wit: 5th. Was anything added to the price of the liquors on account of the labels; and, if so, what amount or price? They answer as follows: "There was nothing added; but the labels added to the value of the liquors, and formed part or parcel of the price."

As to the sixth question of said defendants, to wit: 6th. Was any price put upon the labels or named or mentioned between the parties? If so, what price, or what amount? They answer as follows: "There was no price named."

As to the seventh question of said defendants, to wit: 7th. Was there any agreement to furnish any given quantity of labels or any number of labels agreed to be furnished by the plaintiff? If so, what number was agreed to be supplied? They answer as follows: "There was no agreement as to the number of labels."

Judgment signed Nov. 25, 1874, by

JNO. W. LONGYEAR,
District Judge.

On motion of defendants, ten days' time is granted to defendants on which to settle and file a bill of exceptions in this cause.

19 Afterwards, to wit, on the twenty-fifth day of November, A. D. 1874, came into the court aforesaid the said defendants, by their said attorneys, and filed and entered a motion for a new trial of said cause, which motion is in the words and figures following, to wit:

Motion for new trial.

In the circuit court of the United States for the eastern district of Michigan.

SHERMAN PARIS, MARSHAL J. ALLEN, GEORGE H. Allen, & Augustus S. Pyatt,
vs.
ELLERY I. GARFIELD & GEORGE M. WHEELER.

And now comes the said defendants, by D. B. & H. M. Duffield, their attorneys, and move the court to set aside the verdict and judgment heretofore rendered in this cause, and to grant a new trial thereof, for the following among other reasons:

First. Because the said verdict is contrary to the evidence in the cause.

Second. Because the said verdict includes in the amount thereof the price or value of certain labels which are not included in the plaintiff's bill of particulars.

Third. Because the court erred in admitting evidence concerning the delivery of the labels in New York, against the objection of the
20 defendants' counsel that the same were not named in *in* the plaintiffs' bill of particulars.

Fourth. Because the court erred in his refusal to charge the jury that the delivery of the labels to Wheeler in New York was not a receipt and acceptance of part of the goods sold, within the meaning of the statute of frauds, as requested by the counsel for the defendants.

Fifth. Because the said verdict of said jury is against the evidence and contrary to the charges of the court and to the rights of the defendants, in this, that in the answer of said jury to the fourth special question proposed on behalf of defendants, the jury find that the liquors were received and accepted in New York, when it was conceded by the plaintiffs that, and charged by the court, the liquors were received and accepted in Michigan.

This motion is based upon the files and proceedings and testimony in this case.

D. B. & H. M. DUFFIELD,
Att'ys for Def'ts.

Afterwards, to wit, on the thirtieth day of November, A. D. 1874, the said parties, by their respective attorneys, came into the court aforesaid and filed their stipulation, in the words and figures following:

Stipulation for correcting verdict.

In the circuit court of the United States for the E. dis't of Mich'n.

SHERMAN PARIS ET AL.
vs.
ELLERY I. GARFIELD ET AL.

21 It is stipulated between the parties hereto that an order be entered amending and correcting the verdict in this cause, so that

the answer of the jury to the fourth question proposed on behalf of the defendants be stricken out, and the said question and answer thereto shall read as follows:

"4th. Where were the liquors received and accepted by the defendants?" They answer as follows: "In Detroit Michigan."

And that said order, when entered, shall have the same force and effect as tho' the original record of the verdict had been so entered.

Detroit, Nov. 30, 1874.

DON M. DICKINSON,
Pl'ffs' Att'y.
D. B. & H. M. DUFFIELD,
D'f'ts' Att'ys.

Afterwards, to wit, on said 30th day of November, A. D. 1874, an order was entered in said court, in open court, in the words and following, to wit:

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Detroit, on Monday, the thirtieth day of November, in the year one thousand eight hundred and seventy-four.

Present, honorable John W. Longyear, district judge.

Order correcting verdict.

SHERMAN PARIS, MARSHALL J. ALLEN, George H. Allen, & Augustus S. Pyatt,
vs.
ELLERY I. GARFIELD & GEORGE M. WHEELER.

22 On filing stipulation in this cause, it is ordered that the entry of the verdict in this cause be amended and corrected by striking out the answer to the fourth question, as there entered, and inserting in lieu thereof the words, "In Detroit, Michigan;" so that said question and answer shall read:

As to the fourth question of said defendants, to wit: "Where were the liquors received and accepted by the defendants?" They answer as follows, "In Detroit, Michigan."

Afterwards, to wit, on the seventh day of December, A. D. 1874, the said defendants, by their said attorneys, came into the court aforesaid, and entered a motion in said cause, in the special motion-book of said court, in the words and figures following, to wit:

Motion to set aside judgment, and for judgment for defendants.

In the circuit court of the United States for the eastern district of Michigan.

SHERMAN PARISH AND OTHERS
vs.
ELLERY I. GARFIELD AND ANOTHER.

And now come the said defendants, by D. B. & H. M. Duffield, their

attorneys, and move the court that the judgment heretofore rendered in this cause be set aside, vacated, and altogether held for naught, and that judgment be entered in this cause for the defendants upon the verdict of the jury heretofore rendered in this cause, and their answers to the special questions therewith rendered.

This motion is based upon the files and proceedings in this cause.

Dated Dec. 7, 1874.

D. B. & H. M. DUFFIELD,
D'f'ts' Att'ys.

23 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Detroit, on Monday, the seventh day of December, in the year one thousand eight hundred and seventy-four.

Present, honorable John W. Longyear, district judge.

Order overruling motion for new trial.

SHERMAN PARIS, MARSHALL J. ALLEN, George H. Allen, & Augustus S. Pyatt,
vs.
ELLERY I. GARFIELD & GEORGE M. WHEELER.

The motion of defendants for a new trial in this cause, heretofore argued & submitted, having been duly considered, is now by the court here overruled and denied.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Detroit, on Tuesday, the eighth day of December, in the year one thousand eight hundred and seventy-four.

Present, honorable John W. Longyear, district judge.

Motion of defendants for judgment on questions, &c., denied.

SHERMAN PARIS, MARSHALL J. ALLEN, George H. Allen, & Augustus S. Pyatt,
vs.
ELLERY I. GARFIELD & GEORGE M. WHEELER.

The motion of defendants for judgment upon the questions propounded to the jury on the trial of this cause having been duly considered, is now by the court here overruled and denied.

24

25 Afterward, to wit, on the twelfth day of December, A. D. 1874, the court aforesaid filed their opinion in said court on said motion for a new trial.

Opinion of court on motion for new trial.

United States circuit court, eastern district of Michigan.

SHERMAN PARIS ET AL.
vs.
ELLERY I. GARFIELD ET AL.

Opinion delivered Dec. 7, 1874, on motion for a new trial:

The declaration was on the common and money counts. A bill of particulars of plaintiffs' demand was furnished on request. On the trial it became a material question, under the statute of frauds of New York, whether a part of the things sold by plaintiffs to defendants were received and accepted by the latter, the contract being for the sale of merchandise of the value of more than fifty dollars, and no note or memorandum of the contract having been made, or part payment of the purchase price. For the purpose of enabling the plaintiffs to show such part delivery, receipt, and acceptance, the court admitted evidence on the part of plaintiffs to show that, as a part of the sale and purchase of the goods specified in the plaintiffs' bill of particulars, other things, to-wit, certain copyrighted labels to put upon the goods when offered for sale by defendants, and not mentioned in the bill of particulars, were included in such sale, and that the same were delivered to and received and accepted by defendants at the time the sale was made.

26 This evidence was objected to on the part of defendants on the ground that the said labels were not named in the bill of particulars, but the objection was overruled. The verdict was for plaintiffs. The admission of the labels in evidence and the charge of the court in regard thereto constituted the principal grounds of the motion for a new trial, as the same was finally submitted for decision.

Mess'rs D. B. & H. M. Duffield for the motion.

M'r Don M. Dickinson opposed.

LONGYEAR, J.:

While a bill of particulars should no doubt give as much information as a special declaration, it is equally clear that it is not necessary that it should do any more than that. In case of a special declaration, it is never necessary to aver special circumstances or facts relied on to take the contract declared on out of the statute of frauds, as that a contract for the sale of goods and chattels of the value of more than fifty dollars, or a note or memorandum thereof, was made in writing, or that there was a part delivery, receipt, and acceptance, or part payment. It is sufficient to allege the contract, and these matters may be shown to avoid the effect of the statute; when, therefore, suit is brought to recover the price and value of certain goods and chattels specified in the declaration or bill of particulars, it is always competent to show that others were sold at the same time, not as a basis for recovery, but in order to show that the contract as to those specified, and for

27 which a recovery is sought, was taken out of the statute of frauds by the receipt and acceptance by the defendant of such other goods and chattels.

This was all that was done in admitting evidence of the receipt and acceptance of the labels by defendants in this case. Nothing was claimed by plaintiffs and nothing was allowed by the jury on account of the labels in addition to the price and value of the items specified in the bill of particulars.

2. The court charged the jury, in substance, as matter of law, that if the labels were a part of the things sold, then the conceded delivery of them to, and the receipt and acceptance of them by Wheeler in New York, was such a receipt and acceptance by defendants as would take the contract for the sale and purchase of the goods declared for out of the statute of frauds of New York. Whether the labels were a part of the things sold depended upon certain facts as to which there was some dispute, and the question of fact thus raised was which was submitted to the jury. There was certainly no error in this; but it would have been error to have taken the question from the jury, as was contended should have been done.

Motion for new trial denied.

28

29 In the circuit court of the United States for the eastern district of Michigan.

SHERMAN PARIS, MARSHALL J. ALLEN, GEORGE H. Allen, Augustus S. Pyatt, pl'ffs,
vs.
ELLERY I. GARFIELD, GEORGE H. WHEELER, def'ts.

The jury being duly sworn in this cause, the plaintiffs gave evidence tending to show that the defendants were partners in trade, under the name and style of Wheeler and Garfield, and the plaintiffs partners under the name of Paris, Allen and Company.

Plaintiffs' counsel, further to maintain the issue on their part, produced as a witness George H. Allen, one of the plaintiffs, who, being sworn, testified that the plaintiffs sold to the defendants certain goods.

Witness was then shown plaintiffs' bill of particulars and testified that the same was a true statement of the goods sold.

30 That the amount was forty-one hundred and forty-nine ($4,149$^{00}_{100}$) dollars. That a verbal order was given for said goods by the defendant Wheeler, in plaintiffs' store in New York. That the witness gave said Wheeler a memorandum of the goods he purchased and kept a memorandum himself. Witness further testified that a paper, which was shown him, was the memorandum he kept, which was introduced in evidence, and was in the words & figures following:

EXHIBIT A.

Paris, Allen & Co., importers of brandies, gins, wines, etc., 31 Broad st.,

NEW YORK, 187 .

Wheeler & Garfield:

10	bbls. Old Crow, April, '72	2 50
15	" Oakland	2 00
5	" Old Crow, '69	4 00
1	" bay rum (gold)	2 50
½	cask A. M. & Co., 1858, gold	6 00
½	" O. D. & Co., "	4 00
½	" Demartin sherry △ "	5 10
½	" Demartin sherry △ "	3 00
	½ cask Lighthouse gin "	3 00
31	½ " Sanderman port oo "	5 00

4 mo's—acceptance for 60 day'—at 7 % int., if extra time is

asked. Ship 5 bbls. 69 Old Crow & Oakland & bay rum at once; balance of goods ship 15th Dec. The 10 bbls. '72 Old Crow from K'y with Sanders same time.

That the pencilled memorandum on said order was not made by witness, and he knew nothing of it of his own knowledge. That defendant Wheeler sampled goods similar in kind to the ones he was to purchase by tasting, and called off the items, and took a copy of said memorandum. That the goods so ordered were shipped from New York according to the terms of the order.

NOTE.—On upper left-hand corner of Exhibit A appear the following words and figures in pencil: "179 5 ave., brandy, sherry, labels."

That witness had computed interest on the account to date,
32 and it was..... $182 66
The principal was..... 4,143 69

Total..... 4,326 35

That after the bill became due plaintiffs wrote defendants a note, and came to Detroit in the spring of 1874. Asked Wheeler what he was going to do about the account. He said he could do nothing. Asked him if he could pay anything. He said no. Asked him if he would give his acceptance for the account. He said Garfield would not consent. Asked him if he would return the goods unsold, and give his acceptance for the balance. He said he would see Garfield and fix it up satisfactory. Witness went to Chicago for a few days, and on his return called upon Wheeler for the account, who said he could not get Garfield to give the paper. Witness asked him if plaintiffs had not done what they agreed to. He said yes. Asked Garfield why he would not close the account. He said he did not like to give
33 paper, but said at last witness might see Wheeler, and if he would give the paper he (Garfield) was willing. Witness saw Wheeler and told him this. He said that Garfield talked differently to him. That he would see Garfield and send the paper to New York. That witness went to New York, but defendant never sent the paper. This was in June, 1874. Witness returned to Detroit in September, saw defendants, endeavored to arrange the account without success.

Upon cross-examination said witness was shown a paper or pencilled memorandum in the following words and figures, to wit:

EXHIBIT B.

Paris, Allen & Co., sold Wheeler & Garfield.

10 bbls.	Old Crow, 2 y'rs		*2 50
5 "	" " 69		4 00
15 "	Oakland		2 00
1 †	Punch, bay rum,	gold	2 50
‡	A. M. & C. brandy, 1858,	"	6 00
‡	O. D. & Co., "	"	4 00
‡	Demartin sherry (O)	"	5 10
‡	" " (△) (cased)	"	3 00
34 ‡	Lighthouse gin	"	3 00
‡	Sanderman port, oo	"	5 00

4 mo's acceptance. (I said no.) 4 mo's after that 60 days' note, with the understanding, if they wish 60 days' more time for any portion of the invoice they can have it, adding 7 % int.

Detroit, Nov. 19th, 1873.

NOTE.—In the original the figures "50," (*) are written in ink over 65 in pencil; the letters "bbl." are written in ink over the word punch. (†) The words "4 mos. acceptance, (I said no,") stricken out with a pen in the original. All of said memorandum was written in pencil, except the word "cased," and the words "4 mo's, after that 60 days' note."

Witness stated that the same was made by him in Wheeler and Garfield's store in Detroit. That it was an order for the goods mentioned therein. That the paper had been altered since he wrote it, in the following particulars: $2.50 written over $2.65, the letters bbl. written over puncheon, (in the item bay rum,) and also the words "four mos. after that sixty day' note," and the words "I said no." That witness did not know when these alterations were made, nor in whose handwriting.

That without these alterations the memorandum is the same as the order given in New York. That the last above-mentioned memorandum was a verbal order which defendants gave in Detroit, which was never filled. That about ten days afterwards saw Wheeler in New York, and he gave the verbal order first above referred to. That the only change between the Detroit and the New York order was the price of Old Crow whiskey, and the change from a puncheon of bay rum to a barrel and the terms of the purchase.

Upon redirect examination the witness testified that defendant Wheeler countermanded the Detroit order; from conversation with Wheeler witness understood that he was not going to have any of Detroit order shipped, because he claimed I had sold others for less. But while in New York he verbally ordered the goods described in the first above-mentioned memorandum. That the pencilled memorandum on the corner of the New York memorandum was made at the time Wheeler ordered the goods.

Plaintiffs' counsel then asked witness the question:

Question. When M'r Wheeler gave this order for goods did he ask for labels as a part of the purchase?

To which question being answered the defendants' counsel objected, because the same was incompetent and irrelevant, and because no labels are mentioned in the plaintiffs' bill of particulars.

But the said circuit judge did then and there overrule the said objection, and decided that the same was competent and should be answered.

To which ruling and decision of said circuit judge, the defendants', by their counsel, did then and there except.

The said witness, under the ruling of said circuit judge, answered & testified as follows:

Ans. Yes, sir.

Plaintiffs then asked witness the question:

Question. Did he ask to have these labels delivered?

To which question being answered, and to any testimony concerning the ordering or delivery of any labels, or any testimony whatever concerning said labels, the defendants' counsel objected, because the same was incompetent and irrelevant, and because no labels are mentioned in the plaintiff's bill of particulars.

But the said circuit judge did then and there overrule the said objection, and decided that the same was competent and should be answered. To which ruling and decision of said circuit judge, the defendants, by their counsel, did then and there except.

The said witness, under the ruling of said circuit judge, answered and testified as follows:

Ans. Yes, sir.

Q. Where did he asked to have them delivered?

A. At his hotel.

38 Q. Were they delivered there?

A. Yes, sir.

Q. In the city of New York?

A. Yes, sir.

Q. On the day of the purchase, the day he gave the order?

A. Yes, sir.

Q. Who else was present at the time the order was taken?

A. M'r Pyatt and M'r Wheeler; he dictated the order.

Cross-examination by M'r Duffield:

(Showing the witness a paper.)

Q. Is that a duplicate of this order; is it in your handwriting?

A. Yes, sir; that is a duplicate of the order taken in New York.

(Showing the witness the same paper, which is an exact duplicate of Exhibit A, except the pencil mems in the left-hand upper corner, and the date, this paper being dated Nov. 24, 1873.)

Q. Has that been added to or altered?

A. There is no alteration.

Q. Is there anything upon that with reference to any labels.

39 A. No memorandum made of it. I drew this, but I did not put on the memorandum for labels. It was not on the original order.

Q. When you took the order did you not agree to furnish labels at that time?

A. Yes, sir; I presume I did: I have no doubt of it.

Q. Is not the furnishing of labels merely incidental to the ordering of goods.

A. No, sir: unless parties buy those goods.

Q. Any man who buys those goods always gets the labels?

A. Not always.

Q. As a rule?

A. No, sir, not unless an agreement is made. There are parties to whom I would not like to sell.

Q. If you sell to a person you think is all right, you would furnish him with labels?

A. If a gentleman buys "Old Crow" of me "69 Old Crow," and we agree to furnish him labels, we do so when we believe he will not put up any other whiskey under these labels.

Q. In that case they are merely incidental. You made no sep-

40 arate charges for them as a rule?

A. No, sir; that is included in the agreement.

Q. Your common practice is, not to charge anything for labels?

A. No, sir: that is considered in the price of the bill.

Q. What do you mean by that?

A. If I charge a man so much, I consider it covers the labels.

Q. Do you add anything to the whiskey for the labels?

A. Never have been in the habit of it.

Q. In other words, if you think the party will not put inferior whiskey under these labels you would furnish them, as a rule?

A. No, sir, not as a general rule. We furnish them when it is agreed upon. We have an agreement upon that, whether we shall furnish

them, unless there was an express agreement, and the four dollars was the price charged for the whiskey, and they were furnished to him.

Q. You agreed upon the price of the whiskey and labels?

A. Yes, sir.

Q. Which first?

41 A. I cannot say; I don't know whether he asked me if I would furnish them.

Q. He asked you if you would furnish them labels with the whiskey at four dollars, and you had a talk about the whiskey before that, and the labels came in afterwards.

A. I cannot say positively.

Q. You talked about the price of the whiskey without the labels, did you?

A. I cannot say: my recollection is not clear upon that point.

Q. Did Mr Wheeler ask to have the labels delivered, or did you ask him to let him have them delivered at his hotel?

A. I cannot remember positively.

Q. Did you send anything else up there?

A. Yes, sir. A memorandum was made at the time. Brandy, I think, or sherry, or whiskey: I do not remember exactly. I can tell by referring to the order in N. Y. (Referring to Exhibit A.) The memorandum as it appears here is brandy and sherry, and labels delivered at the 5th Avenue Hotel.

42 Q. What was that brandy and sherry? Did you know his wife was in the city with him?

A. I believe she was.

Q. And you suggested you would send him a bottle of sherry?

A. I presume I did.

Q. Did you suggest that you would send up the labels?

A. I have no recollection of it.

Q. Did you say it to him?

A. I have no recollection of saying any such thing.

Q. You think you might?

A. I cannot say. We proposed to ship the labels to Wheeler & Garfield, and Mr Wheeler said he would take them then, but whether we proposed to send them to his hotel, I cannot say; but I know this, he would take them at this time. We proposed to send them by express. The brandy and sherry was sent to him as a present. There was no charge made of it in the bill.

By a juror: Q. Will you define what you mean by labels?

A. That is a piece of paper upon which we print the affidavit of

43 the parties who originally made it that it is "Old Crow" whiskey, and distilled in Kentucky. We get out a label with the affidavits, or a copy of the affidavits, sworn to by certain persons, showing that this is the genuine "Old Crow whiskey," as there are many whiskeys manufactured and sold upon the reputation of our whiskey. We do this to show that we are the distillers, and that is the Old Crow whiskey which is sold under the labels. It is copyrighted by us, and no one has a right to use it.

(To all of which testimony of said witness concerning said labels the defendants, by their counsel, at the proper time and in due form, objected, as being incompetent and irrelevant, and because no mention was made of any labels in the plaintiffs' bill of particulars. Which objection was overruled by the circuit judge, and the testimony admitted. To which ruling and decision of said circuit judge the defendants, by their counsel, duly excepted.)

44 Plaintiffs' counsel, further to maintain the issue on their part, called Augustus S. Dyatt as a witness, who, being sworn, testified that he was one of the plaintiffs; that his duties were to enter and ship goods; that he remembers defendant Wheeler's coming into plaintiffs' store in 1873, and was present when he gave the verbal order to plaintiff Allen; that Allen was at the desk with Wheeler, and Wheeler read off what he wanted to Allen, and Allen put it down as he stated it; that he thinks Wheeler received a duplicate of the memorandum made by Allen; that the words written in pencil in the corner of Exhibit A were made by witness. Witness further testified, under the same objection and exception as heretofore made by defendants with reference to the labels, as follows:

By M'r Dickinson:

Question. Will you stated what conversation was had in that office in your presence with Wheeler as to the labels?

A. M'r Allen asked M'r Wheeler if he should send them by
45 express or by mail, and M'r Wheeler said no, that he would take the labels along with him; he could put them in his satchel or trunk and take them along with him.

Upon cross-examination by M'r Duffield, witness testified as follows:

Q. Tell the whole conversation.

A. We asked him what he would have sent to his hotel—if he would have something sent to his hotel, and he said yes. I asked him what he would have, and he said brandy and sherry. I then asked him the number of his room, which he gave me, and I put it down on the memorandum at the time.

Q. Is that all you put down at that time?

A. No, sir; I put down the labels.

Q. Was anything said at that time about labels? I mean that particular time.

A. Yes, sir.

Q. What was said?

A. I asked him if we should send the labels by express or mail, and he said no, that he would take them with him.

Q. That was during your conversation about the brandy and sherry?

46 A. Yes, sir.

Q. Then you asked him that, and not M'r Allen?

A. It was in the conversation, and M'r Allen spoke to him about the labels, & so did I.

Plaintiffs, further to maintain the issue on their parts, offered evidence tending to show that on or about the 15th day of December, A. D. 1873, by an error of their bookkeeper's, they notified defendants that the plaintiffs had drawn on them for the amount of their debt, and thereupon the defendants wrote to plaintiffs the following letter, which plaintiffs received, but that plaintiffs never did draw on defendants. Plaintiffs also offered evidence tending to show that the letter was written by the express direction and authority of defendants.

EXHIBIT C.

Office of Wheeler & Garfield, pharmacists, 132 & 134 Woodward avenue, Russell House block. George M. Wheeler, Ellery I. Garfield.

DETROIT, MICH., *December 17th*, 1873.

47 Mess'rs PARIS, ALLEN & Co.:

GENTLEMEN: Yours of the 15th is at hand, & contents noted. We regret you have drawn on us, as we cannot accept, having had a full understanding with your M'r G. H. Allen that the purchase was on open 4 mo's, with the further privilege of extending the time 2 mo's more by adding 7 % interest. If you doubt our word, we have a written contract to that effect. Had he not given us those conditions we would not have given him the order. We can buy all the goods we want in your line on those terms, and have not a single piece of paper afloat, nor do we intend to.

Truly, yours,

WHEELER & GARFIELD.
Cuthbert.

Copy.

Thereupon plaintiff rested his cause.

And the defendants, to maintain the issue on their part, called George M. Wheeler as a witness, who, being duly sworn, testified as follows:

48 That he is one of the defendants. That the verbal order for the liquors was given in Detroit at defendants' store. That Exhibit B is in the handwriting of George H. Allen, except the words "I said no," "four mo's after sixty days' note," "cased." That the figures $2.50 over 2.65 are in the handwriting of witness. That the letters "bbl.," written over "puncheon," witness thinks, is in the handwriting of Allen. That said additions and alterations to said memorandum were made in the presence of Allen and with his consent. Exhibit B was then introduced in evidence. The witness further testified: That about ten days after witness went into plaintiffs' store in New York, and told the plaintiff, Geo. H. Allen, they would have to change the price of "Old Crow" whiskey from 2.65 to 2.50 per gallon. That Allen consented; said he would make a new memorandum, and that it would be all right. That Allen did so, and gave a duplicate to witness. The witness is then shown a paper which he identifies as the copy or duplicate, and the same is introduced in evidence and corresponds in all respects
49 with Exhibit A, except that part of Exhibit A which is in pencil, and the date heretofore mentioned. Witness further testified that he sampled no liquors in New York, and that the Detroit order was changed in no particular except the change of the price of the whiskey from 2.65 to 2.50 per gallon. Witness further testified concerning the labels as follows:

Direct examination by M'r Duffield:

Q. What conversation did you have about labels, and what was done with them?

A. I had a conversation at the store, and also in N. Y. He agreed if we would take the "69 Old Crow" that he would furnish us with labels, so we could put it up in bottles, and that was the understanding.

Q. Was the agreement that he was to furnish labels before or after you agreed upon the price of the "Old Crow?"

A. I do not remember. I think it was after. I think I made the remark that I had seen labels with the advertisement for that,
50 and I asked him if he could not let us have some.

Q. After the price was agreed upon?

A. Yes, sir; it was all talked up, and the agreement made before we said anything about labels. It was after the whole thing was figured at the store.

Q. What conversation did you have about the labels in N. Y.?

A. He said he would send me a bottle of brandy and sherry. At the time I told him I was much obliged to him, and that he might send up the labels at the same time.

Q. How many labels were there?

A. I do not know how many there were; perhaps fifty. I never counted them.

Q. What are the labels for?

A. They are to put on the bottles you put the whiskey into.

Q. Do you know the custom, whether there is any custom among dealers in liquors about furnishing labels for bottling the liquors they sell?

A. There is, sir.

Q. What is the custom?

A. To furnish labels if desired.

Q. Is there any charge?

51 A. No, sir. I have had a dozen different dealers furnish me with labels.

Q. Have you any such labels with you?

A. You have them there, I think.

(Showing labels to witness.)

WITNESS. Those are all labels I have received from different houses I have bought goods of. They always furnish me labels, and never charge me anything for them.

Q. How many houses are there represented?

A. Four or five.

Sundry labels are offered in evidence and marked "Exhibit H."

The following is a copy of the Old Crow label of the plaintiffs.

OLD CROW DISTILLERY, WOODFORD CO., K'Y.

Copper-distilled whiskey. W. A. Gaines, distiller, late Oscar Pepper.

We are the lessees and proprietors of the Old Crow Distillery. All our whiskey is burned on the head of barrel, "Old Crow Distillery copper-distilled whiskey, W. A. Gaines, distiller, late Oscar Pepper, Woodford Co., K'y."

This certifies that Gaines, Berry & Co. are the lessees of my father's (the late Oscar Pepper) Old Crow Distillery, in the county of Woodford, Kentucky. James Crow distilled for my father the whiskey which had so great a reputation in this State as "Old Crow whiskey." On the death of M'r Crow, W'm F. Mitchell was employed as distiller. Any w iskey represented as Old Crow, unless from Gaines, Berry & Co., is fr udulent. Dec. 11, 1867.

JAMES E. PEPPER.

I am distiller for Gaines, Berry & Co. The whiskey I now make is from the formula of M'r Crow, under whom I learned my trade, and like that of M'r Crow, is made in the old-fashioned copper way, being boiled in copper stills, with open wood fires, and is identical with the manufacture of Crow, and is made solely with a view to quality. I am the only person in possession of these receipts, to the best of my belief.

W'M F. MITCHELL.

I am United States general inspector for the seventh district of Kentucky. I have visited officially all the distilleries in Kentucky in which the purely copper-distilled whiskeys of highest repute are made. The manufacture of Mess'rs Gaines, Berry & Co., at their Old Crow Distillery, I regard as made with more cleanliness, uniformity and care than any other whiskey in Kentucky.

W. H. GRAY.

STATE OF KENTUCKY, *ss:*

I, Alexander H. Rennick, clerk of the county court for the county of Franklin, in the State aforesaid, do certify that the foregoing affidavits of William F. Mitchell, James E. Pepper and William H. Gray were this day sworn to by them; and the affidavit of Gaines, Berry & Co. was sworn to by William A. Gaines, one of the partners, all of which is certified.

In testimony whereof I have hereto set my name as clerk as aforesaid, and affixed the seal of said court, this sixteenth day of December, 1867.

[SEAL.] A. H. RENNICK,
Clerk Franklin County Court, Kentucky.

COMMONWEALTH OF KENTUCKY.

I, Sam'l B. Churchill, secretary of the State of Kentucky, certify that A. H. Rennick, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, acting clerk of the Franklin County court.

Witness my hand and official seal, at my office in Frankfort, this sixteenth day of December, A. D. 1867.

[SEAL.] SAM'L B. CHURCHILL,
Secretary of State.

We have appointed Mess'rs Paris, Allen & Co. No., 31 Broad street, New York, our sole agents, and have given them the exclusive control of this make of whiskey. W. A. Gaines & Co. successors to Gaines, Berry & Co.

None of the other labels were marked copyrighted, and the following is a sample of them, which will equally apply to all:

52 PORT [trade mark] WINE FOR MEDICINAL PURPOSES.

Morrow, Chamberlin & Co., 45 Murray st., New York.

Recross-examination by M'r Dickinson:

Q. Will you state whether any of these labels are furnished by Paris, Allen & Co., except these yellow large ones, with these affidavits on.

A. No, sir.

Q. Did you ever buy any other goods of Paris, Allen & Co.?

A. Never did, sir.

Q. Did they ever furnish you with any small labels like these "American Vintage Co."?

A. The only label they furnished me was the label you hold in your hand.

Q. Have you been in the habit, when you got liquors of other houses, of getting anything in the shape of a copyrighted label with affidavits showing the purity of the whiskey?

53 A. Yes, sir; I have of one house. Three or four years ago I bought whiskey of Suit, and labels were furnished me something like that.

Q. Where was that? Where are they?

A. They are all used up. They were similar to that. I don't remember exactly what the affidavit was. It covered the purity of the whiskey.

Witness further testified that he had never heard or been notified that the Detroit order was cancelled. That he did not countermand the Detroit order. That the goods were received and accepted in the defendant's store, in Detroit, and that then was the first time he saw the goods.

Defendant's counsel, further to maintain the issue on their part, introduced as a witness WILLIAM C. HOUSE, who testified as follows:

W'm C. House sworn for defendant.

Examined by M'r Duffield:

Q. You reside in the city of Detroit, and have lived here for some time?

54 A. Yes, sir.

Q. Occasionally do you deal in whiskey?

A. I do.

Q. Bought of Paris, Allen & Co.?

A. Yes, sir; I have.

Q. Bought much?

A. Yes, sir; considerable.

Q. Have you bought any "Old Crow" of them?

A. I have.

Q. Will you state what is their custom upon the purchase of "Old Crow" with reference to labels like this—whether they are furnished by them whenever you bought "Old Crow"?

A. I bought with the understanding I should have "Old Crow" labels.

Q. Did they charge you anything for labels?

A. No, sir; it was included in the price of the "Old Crow."

Q. Supposing you got out of labels for the whiskey?

A. I do not remember ever getting out of them.

Q. Do you ever remember of their sending you the second lot of them?

A. I do not, sir.

Q. Do you know of any instance where they have made a separate charge for the labels?

A. I do not.

55 Q. Have you sold other brands of liquors, either of whiskey or other kinds?

A. I have.

Q. To any extent?

A. Yes, sir.

Q. What other labels have you received in those cases where you bought and the seller knew that you intended to bottle?

A. I have not received any other labels, sir.

Q. Do you know anything about the custom of liquor-dealers in that regard?

A. I do not. I suppose on the particular brands of whiskey like the "Crow" whiskey that the labels would be in the contract for their goods.

Q. You understand it to be?

A. Yes, sir; if so specified. I have never had occasion to inquire for other labels.

Cross-examination by M'r Dickinson:

Q. If you have bought liquors of Paris, Allen & Co., and received these labels, has it not been your custom to make a special contract for the labels?

A. Yes, sir; that I should have the labels with the goods.

Q. A special contract at the time of getting the goods?

56 A. Yes, sir.

Q. How long have you been engaged in the liquor trade?

A. Seven or eight years.

Q. You say that when you buy from a house that has a brand that is protected, you will call for the labels and contract for them, do you not?

A. Yes, sir. There is no way of getting that label except from the house. I do not know of any other way.

Q. Is that label in the trade supposed to aid in selling the liquor?

A. I have always supposed so.

Q. Is it worth a value in selling the liquor?

A. Yes, sir.

Q. Now, in regard to these other labels. Do you know whether it is customary for parties engaged in the trade, whether they be honorable dealers or not, whether they can get these labels not copyrighted and protected like that, & put on that kind of liquor?

(Showing witness all the other labels introduced on Wheeler's examination, except the plaintiff's label.)

A. Yes, sir. They are what is known as "stock labels." You

57 can buy them of any lithographing house.

Q. Does it make any difference, to your knowledge, whether a brand has a trade-mark on it that is not protected, about getting them at the lithographer's?

A. No, sir.

Q. What do you understand by a label that is protected?

A. A copyrighted label gotten up for a particular kind of goods; a copyright gotten up by the house selling that kind of goods.

Q. Are such liquors purchased from the house of Paris, Allen & Co., with this trade-mark upon the liquors, worth any more in the market than liquors purchased without the trade-mark?

A. I so consider them.

Q. You have dealt largely in liquors?

A. I have handled a great many goods.

Q. You have a wholesale grocery-house and sell whiskey?

A. Yes, sir; I sell about one hundred barrels a year.

Redirect examination by M'r Duffield:

58 Do I understand you, that you cannot get these labels from any other house except Paris, Allen & Co.?

A. Yes, sir.

Q. Therefore, that is the only label you can put on?

A. Yes, sir; these are the only labels of "Old Crow."

Q. Is not that the reason you always bargain for them when you buy the whiskey?

A. I do not *not* buy them on account of the goods wholly.

Q. Is not that the reason, when you buy liquor, you always want the labels? It is always understood between you, whether it is expressed or not; is it not always understood when you buy the whiskey, you are to have labels for it?

A. I have always ordered labels whenever I bought whisky at the time of ordering the goods, always speaking about wanting labels.

Q. They have never made any difference in the price on account of labels?

A. No, sir.

Recross-examination by M'r Dickinson:

59 Q. For instance, the article known to the trade as "Henessey's Brandy," do you know that article has a trade-mark of any value?

A. Yes, sir.

Q. Do you know of your own knowledge of trade that a large amount of spurious and adulterated brands has that label marked "Henessey Brandy" upon it?

A. Yes, sir, and it is worthless.

Q. Do you know that any liquor is sold as Old Crow that is not genuine Old Crow that is as good as any sold under that brand?

A. I do not, sir.

Q. Who manufacture this particular brand of Old Crow?

A. Paris, Allen & Company.

Q. Any other house in the United States?

A. No, sir, not to my knowledge.

Q. Are there any other brands manufactured and sold as Old Crow?

A. Yes, sir; I have seen the word crow and different brands.

Q. The object is to get the benefit of the brand of Paris, Allen & Company by deceiving the public?

A. Yes, sir.

By Mr. Duffield:

60 Is the label like this? (Showing the Paris, Allen & Co. label.)

A. No, sir; I have not seen anything like this.

Defendants' counsel, further to maintain the issue on their part, called ROBERT F. CUER as a witness, who, being sworn, testified as follows:

Examined by Mr. Duffield:

Q. Do you live in the city of Detroit?

A. Yes, sir.

Q. How long have you lived here?

A. For the last eight or ten years.

Q. What is your business?

A. I am engaged in the drug busiuess; for the last two years have been a partner of Mr. Wheeler.

Q. Before that what business have you been engaged in?

A. I have been engaged in the drug business for ten years.

Q. Have you purchased liquors, whiskey, brandy, and wines?

A. Yes, sir.

Q. Is there any custom in the trade about furnishing labels
61 —dealers in a particular brand of liquors—any custom about furnishing labels for bottles?

A. Yes, sir.

Q. What is the custom?

A. For a certain kind of fancy brands we furnish labels.

Q. What do you mean by fancy brands? Old Crow, is that a fancy brand?

A. Yes, sir.

Q. How were they furnished; any charge?

A. No, sir; no charge.

Q. Just explain what the custom is.
A. I suppose it is an inducement to parties to purchase the goods.
Q. But no price is charged for them?
A. No, sir; no price for the labels. I have known them to be furnished by various houses.
Q. By what houses?
A. Hopkins and Higgins, Louisville.
(Counsel for plaintiffs object to names being given.)
Q. Do you know anything with reference to this particular label—Old Crow—the custom of the house in that regard?
A. I do not know anything with regard to their custom; no, sir.
62 Q. Do you know of any particular instance where they have furnished labels?
Q. State how they offered—what you mean.
A. For instance, if you purchased a bill of goods from them, they would furnish that kind of label. No direct amount specified for the purpose of bottling the goods.
Q. No amount specified?
A. No, sir.
Q. They would not offer to furnish these labels at any particular price, but upon the simple condition they bought the goods?
A. That was all.

Cross-examination by M'r Dickinson:

Q. That was when the party was negotiating to sell the goods, was it not?
A. Yes, sir.
Q. You stated it was an inducement to buy the goods. Did you ever buy any labels?
A. No, sir.
Q. What was the instance and who made the offer to sell on those terms?
A. M'r Allen.
63 Q. When?
A. I could not give dates.
Q. A year ago?
A. Yes, sir, over a year ago; I do not wish to be understood that he offered any kind of labels or anything of that kind. I mean he would furnish labels or a number of labels for bottles.
Q. Did he give you the price of the goods he would furnish you at the time with the labels?
A. There was no price on the labels.
Q. Did he give you the price of the goods?
A. Yes, sir.
Q. At the time he said he would furnish the labels with the goods?
A. I do not wish to be understood they were included.
Q. I want to know of you, sir, whether the price of the goods was named at the same conversation at which M'r Allen agreed to furnish the labels.
A. Yes, sir; of course.
Q. The naming of the labels was made as an inducement for the purchase.
A. Yes, sir.

Redirect by M'r. Duffield:

64 Q. Were the labels talked of before the sale was spoken of?
(Objected as leading after cross-ex.)

Q. State the substance of the conversation, specifying as particularly as you can when the price was settled and when the labels were spoken of.

A. I do not distinctly recollect the conversation, as I bought no goods, and it passed from my memory. I cannot remember it.

Q. I mean the substance of it.

A. Merely as I gave it to you before.

Q. Specify particularly about the price of the labels.

A. As I said before, I could not give you in substance the conversation any more. It occurred a year and a half ago, or more.

Defendants' counsel, further to maintain the issue on their part, called Ellery I. Garfield as a witness, who, being duly sworn, testified that he had never had any knowledge or notice of the cancellation of the Detroit order, or of any new order in New York.

65 It being conceded by counsel for both parties that this court would take judicial cognizance of the laws of the State of New York, the defendant's counsel read that part of the statutes of the State of New York relative to sales of personal property.

And thereupon the defendants rested their case.

And plaintiffs' counsel, further to maintain the issue on their part in rebuttal of the case made by the defendants, recalled the witness George H. Allen, who testified that another and different paper from Exhibit B was destroyed in New York. That Exhibit B was written in Detroit, in pencil, and witness wrote a copy of it in ink, and signed it Paris, Allen & Co., and left it with def'ts in Detroit; this paper Wheeler brought on to New York and delivered to witness, and witness tore it up in Wheeler's presence; and said witness further testified as to the labels as follows:

George H. Allen recalled for plaintiffs.

66 By M'r Dickinson:

Q. You have heard the testimony of M'r Wheeler as to the custom of furnishing of labels; will you state how long you have been in the business?

A. Eleven years, or thereabouts.

Q. Solely engaged in the business?

A. Nothing else.

Q. Will you state what the custom is as to the furnishing of labels?

A. Just as agreed upon. If a party wants labels of outside brands that we sell, we can go to the lithographers and buy him anything in the shape of labels that he wants, and we sometimes furnish them without charge. It depends upon the kind they want; but as regards such labels as that, that are copyrighted, we never furnish them except by contract. They are copyrighted, and no party is ever furnished with them to our knowledge without our authority; if they did so we should prosecute them.

Q. You sell Crow whiskey of an inferior quality, do you not?

A. *Not*, sir; not of an inferior quality, but younger.

67 The above is all the testimony and evidence introduced on the trial of said cause with reference to the labels and the custom of furnishing them.

Def'ts' counsel also introduced testimony tending to show that the letter Ex. C. was not written by the authority of the defendants.

Thereupon the testimony was closed; and, after argument of counsel

was heard, the defendants counsel requested the court to instruct the jury as follows:

First. That the delivery of the labels to Wheeler, in New York, was not a receipt and acceptance of part of the goods sold within the meaning of the statute of frauds.

But the said court did then and there refuse to instruct the jury as was above requested by the counsel for the defendants, to which refusal so to charge the defendants, by their counsel, did then and there except.

68 Second. That under the testimony there was in New York no memorandum in writing, no part payment, no receipt and acceptance of part of the goods sold sufficient to take the case out of the statute of frauds.

But the said court did then and there refuse to instruct the jury as was above requested by the counsel for the defendants, and did then and there instruct the jury in lieu thereof that under the testimony there was in New York no memorandum in writing, & no part payment, and declined to charge the jury that there was no receipt and acceptance of part of the goods sold sufficient to take the case out of the statute of frauds. To which refusal and modification of said request, the defendants, by their counsel, did then and there except.

Third. That there being no valid contract under the New York statute of frauds, the sale was not consummated until the receipt and
69 acceptance of the goods in Michigan, and, therefore, said sale is invalid.

But the said circuit judge did then and there refuse to instruct the jury as was above requested by the counsel for the defendants, and did then and there instruct the jury in lieu thereof, that if there was no valid contract under the New York statute of frauds, the sale was not consum'ated until the receipt and acceptance of the goods in Michigan, and said sale would be invalid.

To which refusal and modification of said request the defendants, by their counsel, did then and there except.

And the said circuit judge did then and there further charge the jury as follows:

The legislature of the State of Michigan has seen fit to declare absolutely void, and of no effect whatever, all contracts made in relation to or debts contracted for the purchase and sale of spirituous and intoxicating liquors within this State. There are some exceptions in the statute, but they do not concern the present case. * * *

70 Now, gentlemen of the jury, it is a fact, to the existence of which we cannot shut our eyes, that the expediency and policy of the statute in question has been for years very extensively, and very earnestly discussed by the citizens of Michigan, and that prejudices exist on both sides for and against the law of a more than ordinarily severe character.

With these, however, we have nothing to do. It is our duty—yours and mine—to enforce the law as we find it upon the statute-book, regardless of public opinion as to its expediency or policy.

There are, however, some considerations growing out of the nature and character of this legislation to which I deem it proper and my duty to call your attention. It is a law in derogation of the right of property —that which was considered property, at least up to the time of the passage of this law in this State—of that which is considered property to-day even in this State for certain purposes, and which is considered
71 property by the laws of the nation and is taxed as such; and be-

ing in derogation of the right of property, while we must obey it & enforce it in all cases brought within its provisions, yet, because it is of that character, defences set up under it belong to a class of defences which are not favored in the law. Therefore the proof must be clear and satisfactory to your minds that the case is brought strictly within the provisions of the law before you can consistently enforce it.

It is a statute not only in derogation of the rights of property, but it is a penal statute, and for that reason, if for no other, it must receive a strict construction. * * * Contracts for liquors made outside of the State of Michigan are not affected by the statute. It can only affect contracts for the sale of liquors made within the State.

Now, the controversy in this case has taken the peculiar shape
72 it has—and it is the sole controversy—whether the contract for these liquors was made in Detroit in this State, or in New York; for if it was made in Detroit, and the liquors were furnished upon the order which was made in Detroit, then it is clearly a Michigan contract, and is within the provisions of the statute and is void. And the defendants in that case would be entitled to your verdict. But if the contract was made in New York, and was a valid contract there, then it is not affected by the Michigan statute, and is a valid contract, and your verdict must be for the plaintiffs. So the whole controversy narrows itself down to the question whether the goods were delivered upon the order given in Detroit or in New York, with the incidental question as to whether the order given in New York was a valid contract under the statute of frauds of New York.

Whether these liquors were furnished upon the Michigan con-
73 tract and are thus liable to the provisions of the Mich'n law depends upon one of two propositions: if the goods were sold on the order given at Detroit, then that is the end of the case. It was a Michigan contract, & it was prohibited by the Michigan law, and your verdict must be for the defendants. But if the Detroit order was cancelled or superseded and the goods were sold on a new order given in New York and that transaction was finally comsummated so as to make it a good and valid contract under the statute of frauds of New York, then it was a New York contract, and the Michigan statute does not apply, and in that case your verdict must be for the plaintiffs.

That is, even if the goods were sold on the New York order, yet if that transaction was void by the New York statute of frauds, then there was no binding contract until the goods were actually received and accepted by defendants, and it is conceded that such receipt and
74 acceptance took place at Detroit, it would still be a Michigan contract, and void by the Michigan statute.

The question as to the validity of the contract under the New York statute of frauds is only incidental, and for the purpose of determining whether there was any New York contract or not: for, as you see, even if the goods were sold on the New York order, yet if that order was void under the statute of frauds of New York, then it was as if no order had been given, and there was no contract until the goods were received in Detroit by Wheeler and Garfield; and in that case it became a Michigan contract. If the goods were sold on the New York order, you must go a step further, and inquire if enough was done to take the case out of the statute of frauds of New York. That statute I will here read:

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless—
75 "1st. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby,

"2d. Or unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action.

"3d. Or unless the buyer shall at the time pay some part of the purchase-money." 3 New York R. S., p. 221–2, sec. 3.

Now, there is no pretence that there was any part of the purchase-money paid, but it is contended by the plaintiffs that the case is taken out of the statute by two things: first, by a subsequent note or memorandum made and signed by defendants; second, that a portion of the goods bought were accepted and received by Wheeler & Garfield in New York.

These two things contended for by plaintiffs' counsel as taking the case out of the statute are: first, the delivery and acceptance of
76 the labels; second, the letter of Dec. 17th, 1873, from the defendants to the plaintiffs. First, as to the labels: These labels, as the proof shows, and it is undisputed, were for the purpose of putting upon bottles in which the liquor purchased was intended to be put for sale.

They were something more than ordinary labels, indicating the kind of liquor that should be put in the bottles upon which they were placed. It contains an affidavit of the genuineness of the distillation. It is copyrighted, so that no other persons than these plaintiffs would have the right to use that particular label. It is for a certain brand or kind of liquor manufactured and distilled by these plaintiffs only; I believe called the "Old Crow Whiskey." The receipt and acceptance of the labels by Wheeler when in New York at the time of the purchase, or immediately after, is not disputed. That is a conceded fact in the case.

But it is claimed that these labels were no part of the things pur-
77 chased; that they were merely incidental to the purchase; that they were of no value in and of themselves; and that they did not enter into the consideration of the purchase. The contrary is contended on the part of the plaintiffs, and it is for you to determine.

The label, as before remarked, was copyrighted. Copyright is property. It is intangible, but still it is property. It may be valueless for any useful purpose, but still in its nature and character it is property. Now, by the furnishing of the labels with the whiskey, the defendants acquired the right to use this copyright to the extent to which the labels were furnished. Without such furnishing and receipt of labels by the defendant, or some equivalent conferment of right, they had no such right. Were the labels then of any real value to the defendants, and did they enter into and constitute any portion of the things purchased?

The question is not whether they paid more for the whiskey than they otherwise would have paid, but was the whiskey worth more to
78 the defendants on account of the labels, and were the labels included in the contract. If they were, and these other conditions existed, then the receipt and acceptance of the labels by Wheeler took the case out of the New York statute of frauds, because then there was a receipt and an acceptance by him of a portion of the things purchased; otherwise, not.

In that case the transaction was made a valid New York contract, and your verdict must be for the plaintiffs; otherwise, it was not made valid by such receipt, and you will find to the contrary. If the contract was not made valid by the receipt and acceptance of the labels by Wheeler, and if not made valid by the letter of December 17th, 1873, it was still a Michigan contract because of the receipt and acceptance of the liquor here, and was void, and the verdict in that case would be for the defendants.

This brings me, then, to this letter of Dec. 17th, 1873. I have considerable difficulty in dealing with this question, but I find, upon
79 a careful analysis of my own views upon the subject, that the difficulty arises more from what I know and have learned from the case outside of the letter than what is contained in the letter.

A subsequent recognition of a verbal contract in order to take it out of the statute of frauds must be, to say the least, as full and complete in its details as any note or memorandum made at the time of the contract must have been.

If the subsequent written acknowledgment of the existence of the contract falls short of this, it would not be such a note or memorandum of the contract as is contemplated by the statute. If it would not have been sufficient if made at the time of the contract, then it would not be sufficient as a subsequent recognition. If, in other words, the material portions of the contract are not stated in the written memorandum or subsequent recognition so that parole proof is necessary to make
80 it a contract, in connection with the written memorandum, then it is not a sufficient memorandum.

Now, construing this letter by these rules, I am of opinion that it is not sufficient. It does not state what was purchased. It does not state the price or amount of the purchase. These are two things material to the understanding of the contract, and must be shown by parole in order to make it applicable according to the rule just laid down. This is for the court to determine, and I charge you, and I do so specifically, that this letter is not sufficient to take the case out of the statute of frauds of New York.

The question, however, whether it is taken out of the statute of frauds or not does not depend upon this letter alone, unless you shall find against the other proposition which I have laid before you, viz, the delivery and acceptance of the labels. If you shall find under the charge of the court that the acceptance of the labels took the case out of the statute
81 of frauds, then the letter becomes of no consequence. It is only important, whether the letter took it out or not, in case you shall find that the delivery of the labels did not take it out of the statute. If you shall find that the contract was taken out of the statute of frauds, under the charge already given, by the acceptance of the labels by Wheeler, that is the end of the inquiry. It was then a New York contract, and the Michigan prohibitory statute does not apply.

This letter, however, may be used by you in another connection, and to which I ought to have alluded in its proper place, and that is, in determining the first proposition submitted to you, whether these goods were sold on the Detroit order or on the New York order.

Counsel for defendants did then and there also except to that part of said charge which instructed the jury that the liquor law of the State of Michigan is in derogation of the right of property, and that de-
82 fences set up under it belong to a class of defences which are not favored in the law, and did also severally except to that part of said charge which instructed the jury that said statute is also a penal statute, and must receive a strict construction, and did also severally except to that part of said charge which instructed said jury as follows, to wit:

"Were the labels then of any real value to the defendants, and did they enter into and constitute any portion of the things purchased? The question is not whether they paid more for the whiskey than they otherwise would have paid, but was the whiskey worth more to the defendants on account of the labels, and were the labels included in the

contract? If they were, and these other conditions existed, then the receipt and acceptance of the labels by Wheeler took the case out of the New York statute of frauds, because then there was a receipt and an acceptance by him of a portion of the things purchased; other-
83 wise, not. In that case the transaction was made a valid New York contract, and your verdict must be for the plaintiffs; otherwise, it was not made valid by such receipt, and you will find to the contrary."

And because none of said exceptions so made to the decisions and rulings of said court appear upon the record of said trial, therefore at the request of said defendant the said judge of said court hath signed this bill of exceptions this sixth day of February, A. D. 1875.

JNO. W. LONGYEAR,
District Judge.

84

85 *Bond.*

Know all men by these presents that we, George M. Wheeler and Ellery I. Garfield, of Detroit, Michigan, as principal, and William Brodie, Newell Avery, and S. J. Murphy, of Detroit, Michigan, as sureties, are held and firmly bound unto Sherman Paris, Marshall J. Allen, George H. Allen, and Augustus S. Pyatt, of the city, county, and State of New York, in the full and just sum of sixty-five hundred dollars, to be paid to the said Sherman Paris, Marshall J. Allen, George H. Allen, and Augustus S. Pyatt, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this twenty-eighth day of December, in the year of our Lord one thousand eight hundred seventy-four.

Whereas, lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court, between Sherman Paris, Marshall J. Allen, George H. Allen, Augustus S. Pyatt, as plaintiffs, and Ellery I. Garfield and George M. Wheeler, defendants, a judgment was rendered against said defendants, and in favor of said plaintiffs, for the sum of four thousand three hundred and twenty-six dollars, and costs to be taxed, and the said Ellery I.
86 Garfield and George M. Wheeler, defendants, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Sherman Paris, Marshall J. Allen, George H. Allen, and Augustus S. Pyatt, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and seventy-five:

Now, the condition of the above is such, that if the said Ellery I. Garfield and George M. Wheeler shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good,

then the above obligation to be void: else to remain in full force and virtue.

(Sig'd) GEO. M. WHEELER. [SEAL.]
E. I. GARFIELD. [SEAL.]
WM. BRODIE. [SEAL.]
NEWELL AVERY. [SEAL.]
S. J. MURPHY. [SEAL.]

Sealed & delivered in presence of—
JNO. J. SPEED, as to G. M. Wheeler.
GEO. H. MILLER, as to E. I. Garfield & Wm. Brodie.
D. N. AVERY, as to Newell Avery and S. J. Murphy.

Approved both as to amounts and the sufficiency of the sureties. Dec. 28, 1874.

(Sig'd) JNO. W. LONGYEAR,
District Judge.

(Endorsed:) Filed in clerk's office, Dec 28, 1874. A. Mandell, cl'k.

87 EASTERN DISTRICT OF MICHIGAN, ss:

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify that the above and foregoing is a true transcript of the original record of the judgment of said court in the case of Sherman Paris, Marshall J. Allen, George H. Allen, and Augustus S. Pyatt, plaintiffs, against Ellery I. Garfield and George M. Wheeler, defendants, and of the bond on writ of error filed in said cause; that I have carefully compared the same with the originals of said record and of said bond, and the same is a true and correct transcript thereof, and of the whole thereof. I further certify that the bill of exceptions thereto attached is the original bill of exceptions filed in said cause.

In testimony whereof I have hereunto set my hand officially and affixed the seal of said court, at Detroit, this eighth day of October, A. D. 1875.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $22.95; postage, .72—$23.67.

(Indorsement on cover:) No. 250. Ellery J. Garfield and George M. Wheeler, plaintiffs in error, vs. Sherman Paris, Marshall J. Allen, George H. Allen, and Augustus S. Pyatt. Filed 18 October, 1875. E. Michigan C. C. U. S.

Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1877.

No. 250—Law.

ELLERY I. GARFIELD et al,

Plaintiffs in Error,

vs.

SHERMAN S. PARIS et al,

Defendants in Error.

Brief for Plaintiffs in Error.

HENRY M. DUFFIELD,

Of Counsel for Plaintiffs in Error.

DETROIT:
FREE PRESS BOOK AND JOB PRINTING HOUSE.
1878.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

ELLERY I. GARFIELD AND
GEORGE M. WHEELER,
Plaintiffs in Error,

vs.

SHERMAN PARIS,
MARSHALL J. ALLEN,
GEORGE H. ALLEN AND
AUGUSTUS S. PYATT,
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

STATEMENT OF THE CASE.

The defendants in error (plaintiffs below), a wholesale liquor house in New York City, sued the plaintiffs in error (defendants below) for the price of certain whiskeys and other intoxicating liquors, amounting, with interest, to the sum of forty-three hundred and twenty-six dollars and thirty-five cents.

Neither the bill of particulars, nor the memorandum or invoice of the goods sold made any reference to any labels as part of the things sold.

Bill of Particulars, Record, p. 3.
Mem. of Goods, Record, p. 11.

Plaintiffs in error, in defence to the action, set up the prohibitory liquor law of Michigan, making void all sales of spirituous or intoxicating liquors except in certain specified cases, none of which concern the present case.

On the trial the defendants in error gave testimony tending to establish that Wheeler, one of the plaintiffs in error, gave a verbal order to one of defendants in error, at their store in New York City, for the liquors specified in the bill of particulars; that at the same time, at the request of Wheeler, certain labels were sent to him at his hotel in New York City; that these labels were pieces of paper upon which defendants in error printed the affidavit of the parties who originally made the liquor, that it was "Old Crow" whiskey, and distilled in Kentucky; that they were copyrighted by defendants in error, and no one had the right to use the labels. A copy of one of the labels is set out on p. 18 of record.

To the admission of all the testimony concerning these labels, the plaintiffs in error objected and accepted in due form and season, as incompetent and irrelevant, and because no mention was made of any labels in the plaintiffs' bill of particulars.

Defendants in error further introduced evidence tending to prove that the liquors were shipped to Detroit, Mich., to plaintiffs in error, and had there been received by them.

Plaintiffs in error introduced evidence tending to prove that the liquors were sold to them by defendants in error upon a verbal order given by Wheeler, one of plaintiffs in error, in their store in Detroit, Mich.; that no new order was given in New York City, but the price of the Old Crow whiskey was changed by Wheeler and Allen, one of the plaintiffs in error, from $2.65 to $2.50; that Allen agreed with Wheeler that if plaintiffs in error took the "'69 Old Crow" he would furnish plaintiffs in error with

labels so that they could put it up in bottles; that there is a custom among dealers in liquors to furnish labels for bottling the liquors they sell, if desired, without charge. A sample of such labels was introduced. (Record, p. 19.)

Defendants in error introduced evidence tending to show that it was not their custom to furnish Old Crow labels, except where they were satisfied that the buyer would not use them for the sale of inferior whiskey.

The statute of the State of New York relative to sales of personal property was read, pursuant to stipulation of parties.

It was conceded that no price was put upon the labels; that no particular number of labels was agreed to be furnished; that nothing was added to the price of the whiskey on account of the labels.

The plaintiffs in error requested the court to instruct the jury:

1. That the delivery of the labels to Wheeler, in New York, was not a receipt and acceptance of part of the goods sold, within the meaning of the statute of frauds.

2. That under the testimony there was in New York no memorandum in writing; no part payment; no receipt and acceptance of part of the goods sold sufficient to take the case out of the statute of frauds.

3. That there being no valid contract under the New York statute of frauds, the sale was not consummated until the receipt and acceptance of the goods in Michigan, and, therefore said sale is invalid.

The court declined to give the instructions above requested, or either of them, either in substance or language, and plaintiffs in error excepted to each and all of such refusals.

The court, on its own motion, in charging the jury, used this language:

4. There are, however, some considerations growing out of the nature and character of this legislation to which I deem it proper and my duty to call your attention. It is a law in derogation of the right of property, that which was considered property, at least, up to the time of the passage of this law in this State. * * * And being in derogation of the rights of property, while we must obey it and enforce it in all cases brought within its provisions, yet because it is of that character, defences set up under it belong to a class of defences which are not favored in the law: therefore, the proof must be clear and satisfactory to your minds that the case is brought strictly within the provisions of the law before you can consistently enforce it.

Again, in his charge, the court said:

It is a statute not only in derogation of the rights of property, but it is a penal statute, and for that reason, if for no other, it must receive a strict construction.

Again, in his charge, the court said:

Were the labels then of any real value to the defendants (plaintiffs in error), and did they enter into and constitute any portion of the things purchased? The question is not whether they paid more for the whiskey than they otherwise would have paid, but was the whiskey worth more to the defendants on account of the labels, and were the labels included in the contract? If they were, and these other conditions existed, then the receipt and acceptance of the labels by Wheeler took the case out of the New York statute of frauds, because then there was a receipt and acceptance by him of a portion of the things purchased, otherwise not. In that case the transaction was made a valid New York contract, and your verdict must be for the plaintiffs, otherwise it was not made valid by such receipt, and you will find to the contrary.

To each one of the foregoing instructions, given to the jury by the court upon his own motion, the defendants below by their counsel excepted.

In their verdict, the jury, in accordance with the practice under the Michigan statute, answered the special questions of plaintiffs in error as follows:

As to the first question of said defendants, to wit: 1st. Was there any memorandum in writing for the purchase of these goods signed by Wheeler, in New York? They answer as follows: "There was not."

As to the second question of said defendants, to wit: 2d. Was there any receipt and acceptance in New York of part of the goods sold? If so, what were so received? They answer as follows: "There was, to wit, certain labels."

As to the third question of said defendants, to wit: 3d. Was there any part payment of the price or earnest money paid in New York? If so, what amount, and by whom? They answer as follows: "None."

As to the fourth question of said defendants, to wit: 4th. Where were the liquors received and accepted by the defendants? They answer as follows: "In Detroit, Michigan."

As to the fifth question of said defendants, to wit: 5th. Was there any thing added to the price of the liquors on account of the labels; and, if so, what amount or price? They answer as follows: "There was nothing added, but the labels added to the value of the liquors, and formed part or parcel of the price."

As to the sixth question of said defendants, to wit: 6th. Was any price put upon the labels or named or mentioned between the parties? If so, what price, or what amount? They answer as follows: "There was no price named."

As to the seventh question of said defendands, to wit:

7th. Was there any agreement to furnish any given quantity of labels or any number of labels agreed to be furnished by the plaintiffs? If so, what number was agreed to be supplied? They answer as follows: "There was no agreement as to the number of labels."

Upon this verdict the plaintiffs in error moved for a judgment upon the answers of the jury to the special questions therein under the provision of the statute of Michigan, but the court denied the motion.

The questions in the case arise on the admission of the testimony as to the labels, the refusal of the court to charge as requested by counsel for plaintiffs in error; the correctness of his instructions to the jury upon his own motion and the correctness of his denial of the motion of plaintiffs in error for judgment upon the special findings of the jury.

ASSIGNMENT OF ERRORS.

I. Said Court erred in refusing to charge the jury:

That the delivery of the labels to Wheeler, in New York, was not a receipt and acceptance of part of the goods sold, within the meaning of the statute of frauds.

II. Said Court also erred in refusing to instruct the jury:

That under the testimony, there was in New York no memorandum in writing; no part payment; no receipt and acceptance of part of the goods sold, sufficient to take the case out of the statute of frauds.

III. Said Court erred in refusing to charge the jury:

That there being no valid contract under the New York statute of frauds, the sale was not consummated until the receipt and acceptance of the goods in Michigan, and, therefore, said sale is invalid.

IV. Said Court erred in instructing the jury, on his own motion, as follows:

"There are, however, some considerations growing out of the nature and character of this legislation" (the prohibitory liquor law of Michigan), "to which I deem it proper and my duty to call your attention:

"It is a law in derogation of the right of property; that which was considered property at least up to the time of the passage of this law in this State; of that which is considered property to-day even in this State for certain purposes, and which is considered property by the laws of the nation, and is taxed as such: and being in derogation of the right of property, while we must obey it and enforce it in all cases brought within its provisions, yet because it is of that character, defenses set up under it belong to a class of defenses which are not favored in

the law; therefore, the proof must be clear and satisfactory to your minds that the case is brought strictly within the provisions of the law before you can consistently enforce it."

V. Said Court erred in instructing the jury, on his own motion, as follows:

"It" (the prohibitory liquor law of Michigan) "is a statute not only in derogation of the rights of property, but it is a penal statute, and for that reason, if for no other, it must receive a strict construction."

VI. Said Court also erred in instructing the jury, on his own motion, as follows:

"Were the labels, then, of any real value to the defendants, and did they enter into and constitute any portion of the things purchased? The question is not whether they paid more for the whiskey than they otherwise would have paid, but was the whiskey worth more to the defendants on account of the labels, and were the labels included in the contract? If they were, and these other conditions existed, then the receipt and acceptance of the labels by Wheeler took the case out of the New York statute of frauds, because then there was a receipt and acceptance by him of a portion of the things purchased, otherwise not. In that case, the transaction was made a valid New York contract, and your verdict must be for the plaintiffs: otherwise, it was not made valid by such receipt, and you will find to the contrary."

VII. Said Court also erred in rendering judgment for the plaintiffs and denying the motion of the defendants, for judgment upon the answers of the jury to the special written questions put to them by the defendants' counsel.

BRIEF.

I.

The admission of the evidence concerning the labels, which were not mentioned in the bill of particulars was erroneous.

"The office of a bill of particulars is to inform the opposite party of the *causes of action* to be relied upon on the trial which are not specifically set out in the declaration."

Bosworth, J., in Bowman v. Earle, 3 Duer R., p. 694.
Davis v. Freeman, 10 Mich. R., p. 188.

The plaintiff will be *confined to the items it contains.*

2d Arch. Pr., p. 222.
1st Tidds Pr., p. 599.
Williams v. Sinclair, 3 McLean R., p. 289.

When furnished it is deemed part of the declaration.

Starkweather v. Kittle, 17 Wend. R., p. 20.

The plaintiff must be confined to the particulars he has specified as closely and effectually as if they constituted *essential allegations in a special declaration.*

Commonwealth v. Giles, 1 Gray R., p. 469.
Commonwealth v. Snelling, 15 Pick. R., p. 321.

Plaintiff will not be allowed to establish his claim *in a manner different from that* in which he has elected by his bill of particulars to consider the defendant his debtor.

DeSobry v. DeLaistre, 2 Harr. & Johns. R., p. 191.

Under the ruling of the court admitting the evidence, and his charge to the jury, the plaintiffs recovered upon a contract essentially different from the one set out in their declaration, of which their bill of particulars was an essential part. And they recovered for the *value* of property not mentioned in their bill of particulars.

II.

The errors assigned upon the refusal of the court to charge as requested by plaintiffs in error, and his charge on his own motion upon the question of the effect of the delivery of the labels may properly be considered together.

The statute of Michigan passed February 3d, 1855, and remaining in force at the time of the sale in question in this suit, is as follows:

SECTION 1. *The people of the State of Michigan enact:* That no person shall be allowed to manufacture or sell, at any time, by himself, his clerks, servants, or agent, directly or indirectly, any spirituous or intoxicating liquors, or any mixed liquors, a part of which is spirituous or intoxicating, except as hereinafter specified.

SEC. 2. All payments for such liquors hereafter sold in violation of law shall be considered as having been received without consideration, and against law and equity, and any money or other property paid therefor may be recovered back by the person so paying the same, his wife or any of his children, or his parent, guardian, husband or employer, and all sales, transfers, grants, releases, quit-claims, surrenders, mortgages, pledges and attachments of real or personal estate and liens and securities thereon, of whatever name or nature, and all contracts or

agreements relating thereto hereafter made, the consideration whereof, either in whole or in part, shall have been the sale or agreement to sell any such liquor, shall be utterly null and void against all persons and in all cases, excepting only as against the holders of negotiable securities or the purchasers of property, who may have paid therefor a fair price and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration; nor shall any suit at law, or in equity, be had or maintained upon any contract or agreement hereafter made, the consideration whereof shall be either wholly or in part the sale of such liquors in violation of law, excepting only when such suit is brought by such *bona fide* holders of negotiable paper, or purchaser of property without notice."

* * * * * * * *

Vol. 1 Compiled Laws of Michigan, p. 690, §§ 2136, 2137.

Directly after the passage of this act, it was attacked as unconstitutional, but sustained by the Supreme Court of the State of Michigan in

People v. Hawley, 3 Mich. R., 330.
People v. Gallagher, 4 Mich. R., 244.

If the sale of the liquors for the price of which the action below was brought, was a Michigan contract, it was void under this statute and plaintiffs could not recover.

Myers v. Carr, 12 Mich. R., p. 63.
Roethke v. Philip Best Brewing Co., 33 Michigan R., p. 341.
In Re Paddock, 6 Nat. Bank'cy Regr., p. 132.

The sale was not made in the state of New York unless

there consummated, or unless a valid binding agreement of sale was there made between the parties.

The statute of the state of New York relative to sales of personal property is as follows, viz.:

"Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void unless:

"1st. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby.

"2d. Or unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action.

"3d. Or unless the buyer shall at the time pay some part of the purchase money."

3 New York Rev. Sts., pp. 221-2, § 3.

If, as defendants in error contended in the court below, the sale was upon the verbal order given in New York, the New York statute of frauds applies to it, notwithstanding the goods were to be shipped to Michigan.

Scudder v. Union Nat'l B'k, 91 U. S. Rp., 406.
Dacosta v. Davis, 24 New Jersey, Law R., p. 319.
Denny v. Williams, 87 Mass. R., p. 1.
Evans v. Kittrell, 33 Ala. R., p. 449.
McAllister v. Smith, 17 Ills. R., p. 328.
Titus v. Scantling, 4 Blackf. R. (Ind.), p. 89.

If its validity were to be determined by the law of the State of Michigan, the statute of frauds of that State is substantially the same with that of New York State, viz.:

"No contract for the sale of any goods, wares or merchandize for the price of fifty dollars, or more, shall be

valid unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

Compiled Laws of Mich., 1871, p. 1457, § 4699.

And in such case the Michigan liquor law above quoted would avoid the transaction, irrespective of the statute of frauds.

Under the New York statute of frauds, there was no consummated sale, or binding agreement of sale, in New York City.

a. There was no note or memorandum.

b. There was no part payment of purchase money.

c. There was no receipt and acceptance of part of the goods sold.

The delivery of the labels to Wheeler was not such a receipt and acceptance.

These labels were not invoiced; no price was put upon them; no given amount or number of them was agreed to be furnished; nothing was added to the price of the whiskey on account of them. They are not proven to be of any value. They were not to be paid for. They were a mere incident of the sale; a species of advertisement of the "Old Crow Whiskey" thrown into the bargain. They were no part of the goods sold, within the meaning of the statute of frauds. Their receipt and acceptance did not satisfy the statute. To do so "the receipt and acceptance by the buyer must be such as completely affirms the contract."

Heath, J., in Kent v. Huskinson, 3 Bos. and Pull. R., p. 223.

It must appear that the vendor has parted with the possession of the goods, and placed them under the control of the purchaser, so as to put a complete end to all the rights of the unpaid vendor, as such.

Gray v. Davis, 10 N. Y. R., 285.
Messer v. Woodman, 22 N. H., 172, 182.
See numerous cases cited in 2 vol. Addison on Contracts, p. 113, note 3.

It is not enough that the buyer should have taken a part of the goods in his possession,

Browne on the Statute of Frauds, § 326,

nor have taken out a sample,

German v. Boddy, 2 Carr. and Ker. R., p. 145,

nor even examined the whole lot delivered for the purpose of ascertaining the quantity or quality,

Baylis v. Lindy, 4 L. T. N. S., p. 176;

even though the lot be injured thereby.

Curtis v. Pugh, 10 Adol. & Ell. R., p. 111.
Elliott v. Thomas, 3 Mees. & Wels. R., p. 170.

A case somewhat resembling this is decided against the validity of the contract in

Delventhal v. Jones, 53 Mo. R., p. 460.

And the later decisions have firmly laid down the important and true principle that there can be no acceptance and receipt affirming and binding the contract, *so long as the*

buyer has the privilege of returning the goods as objectionable in quantity or quality.

Hanson v. Armitage, 5 Barn. and Ald., 557.
Howe v. Palmer, 3 Barn. and Ald., 321.
Acebal v. Levy, 10 Bing., 376.
Nicholle v. Plume, 1 Carr. and Pa., 272.
Norman v. Phillips, 14 Mees. and Wels., 277.
Bushel v. Wheeler, reported in 15 Adol. and Ell., N. S., 442 N.
Smith v. Surnam, 9 Barn. and Cres, 561.
Coats v. Chaplin, 3 Adol. and Ell., N. S., 483.
Jordan v. Norton, 4 Mees. and Wels., 155; And see, to the same effect, Shindler v. Houston, 1 Comst. (N. Y.), 261.
Outwater v. Dodge, 6 Wend. (N. Y.), 400.
Lloyd v. Wright, 25 Georgia, 215.
Spencer v. Hale, 30 Verm., 314.
Maxwell v. Brown, 39 Maine, 98.
Shepherd v. Pressy, 32 N. H., 49.
Coombs v. Bristol and Exeter Railway Co., 3 Hurl. and Norm., 510.
Rogers v. Phillips, 40 N. Y. R., p. 519.

Can it be seriously urged that by merely allowing the labels to be sent to his hotel in New York, Wheeler thereby precluded himself from objecting that the liquors afterwards furnished were not the goods he purchased? Could the plaintiffs have compelled defendants to take any liquors they might choose to ship, because Wheeler, while in New York, had accepted a few labels? Or, on the other hand, can it be claimed that plaintiffs, by delivering the labels, had lost their right of stoppage *in transitu* in case defendants became insolvent.

Many thousand copies of

"That Husband of Mine"

have been sold during the past year. In all cases, posters and hand-bills, to be used in advertising the books, were sent with them. Would a verbal purchase of a number of these books be taken out of the statute of frauds by proving a delivery of some of these hand-bills to the buyer? Or, could an insolvent buyer fasten upon the publishers a verbal sale upon credit, and take the case out of the statute by proving his receipt and acceptance of a few of these hand-bills?

If we let down the bars of the statute to this extent, what safeguards are left in it?

III.

For the reasons above stated the court should have granted the motion of defendants below for a judgment upon the answers of the jury to the special questions.

The Michigan statute is as follows:

"No jury shall be compelled, in any case, to give a general verdict, so that they may not find a special verdict showing the facts respecting which the issue is joined, and therein require the judgment of the court upon such facts; and in all cases where an issue of fact is tried before any court of record, the court shall, at the request in writing of the counsel of either party, instruct the jury, if they return a general verdict, also to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk

and entered upon the minutes; and when a special finding of fact shall be inconsistent with a general verdict the former shall control the latter, and the court shall give judgment accordingly."

Com. Laws of Mich., p. 1728, §6026.

The special findings show that there was nothing to take the case out of the New York Statute of Frauds.

The jury distinctly find that there was no memorandum in writing, no part payment of price or earnest money, no receipt and acceptance in New York of any of the goods except the labels, and the liquors were received and accepted in Detroit, Michigan.

IV.

The instructions of the court below to the jury, that the statute was in derogation of the right of property * * * and defenses set up under it belonged to a class of defenses which are not favored in the law, and therefore the proof must be clear and satisfactory to their minds that the case was brought strictly within the provisions of the law before they could consistently enforce it; and again, that the statute was a penal statute and must, for that reason, if for no other, receive a strict construction: were improper.

The construction of the statute, either lax or strict, was not in the province of the jury. The nature of the law did not concern them. They had nothing to do with the character of the defense if it was *a legal defense*. No more clear or satisfactory proof *of the facts* could be required in this defense than would have been sufficient in a case of payment or satisfaction.

The simple duty of the jury was to find the facts according to the evidence. The consequences of such finding they could not rightfully consider.

These rulings worked prejudice to the defendants. They conveyed the idea that there was moral turpitude in the defense. The learned trial judge seemed to consider the defense as odious. Though the defendants merely pleaded a valid statute, the court, like Bassanio, urged the jury

> "To do a great right, do a little wrong."

In effect, intimated to the jury that they ought to beat the defense if they could. And it had its effect.

In the face of the conceded proof of a receipt and acceptance of the liquors in Detroit, Michigan, the jury found such receipt and acceptance in New York.

A finding so clearly against the evidence that the court was compelled to order the verdict corrected by stipulation.

We submit that the judgment of the court below should be reversed, and that the Circuit Court of the United States, for the Eastern District of Michigan, should be directed to enter judgment upon the verdict in favor of the plaintiffs in error.

HENRY M. DUFFIELD,
Of Counsel for Plaintiffs in Error.

Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM, 1877.

No. 250--LAW.

ELLERY J. GARFIELD, *et al*,
Plaintiffs in Error,

versus

SHERMAN PARIS, *et al*,
Defendants in Error.

Brief for Defendants in Error.

DON M. DICKINSON,
Of Counsel for Defendants in Error.

NEW YORK:
HENRY W. TURNER, LAW AND MERCANTILE PRINTER, 26 & 28 VESEY STREET.
(Law Telegraph, No. 12.)
1878.

In the Supreme Court

OF THE UNITED STATES.

ELLERY I. GARFIELD AND GEORGE M. WHEELER,
Plaintiffs in Error,

vs.

SHERMAN PARIS, *et al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Correction of "statement of the case" in the brief for Plaintiffs in Error.

The statement of the case does not give the very material point shown in the bill of exceptions, that the plaintiffs below introduced testimony tending to show that the "Old Crow" labels were never furnished to buyers, except a special agreement was made for that purpose in the contract of purchase, and that the value of the labels entered into the price charged for the goods, and that the labels were a part of the thing sold.

At folio 36 of the record, it will be seen that the witness Allen, testified that when the order for the goods was given, Wheeler, (one of the defendants below,) "*asked for the labels as part of the purchase.*"

At folio 39, he says the labels are never furnished "*unless an agreement is made.*"

So, at *folio* 40, he states clearly that the labels are not furnished in any case unless an agreement is made for that purpose, and that then the labels enter into the price charged.

At folio 49, defendant Wheeler himself testifies that in this case a special agreement was made in the contracts of purchase, as a part of the contract that labels should be furnished.

At folio 55, a witness (House,) produced by defendants themselves, testifies that these labels are furnished when "in the contract for the goods."

The same witness at *folios* 56 *and* 57, testifies that the labels add to the market value of the goods.

At page 11 of the record, the language of the Court below shows that it was a principally disputed point below, whether the labels entered into the price of the thing sold; it is as follows: "Whether the labels "were a part of the things sold, depended "upon certain facts as to which there was some "dispute, and the question of fact thus raised was which "submitted to the jury." The defendants below put the question fairly to the jury, and the jury answers: * * "*The labels added to the value of the liquors and formed part or parcel of the price.*" *See record folio* 18.

We say, therefore, that the statement of the case by the Plaintiffs in Error omits a principal part without which a clear understanding cannot be had of the rulings below. And we take issue with that part of the statement in the brief of counsel (at page 3) which says: "It was conceded * * * * ; that nothing was added to the price of the whisky on account of the labels."

The goods were ordered in New York, the Plaintiffs in Error being personally present in the storehouse of Defendants in Error, where a full bill of items of the the goods was made out in duplicate, the one being then delivered to Plaintiffs in Error and the other retained by Defendants in Error.

See Record p. 11, folio 30, and p. 14, folio 38.

This memorandum showed the terms of the sale; the goods were all delivered and retained without objection.

I.

If then there was evidence tending to show that the labels were expressly contracted for and were a part of the entirety purchased—or in the language of the statute of frauds, "*part of such goods*;" if there was evidence tending to show that such "part of such goods" were "*accepted and received*" by the buyers in the city of New York, we fail to see wherein the court erred in leaving it to the jury whether they believed the evidence, and if so, instructing them that the New York Statute was satisfied.

But it is urged that there was nothing about labels in the plaintiff's bill of particulars, and it is argued that the bill of particulars, being a part of plaintiff's declaration, should have apprised the defendants of the claim as to the labels.

A bill of particulars or a declaration never states matter of evidence, but merely the *cause* for which the action is brought. Our *claim* was for the price of certain goods naming them, and our *evidence*, that we had a *contract* on which we sued, was the *delivery* of a portion of the things purchased. If instead of a delivery of a part of the things sold, we had claimed the contracts valid under the statute, by reason of there having been a memorandum in writing, we would not have referred to the writing in the declaration or bill of particulars; neither would we have referred to the payment of "earnest money' if we had claimed validity under the other clause of the statute.

No rule of pleading is better established than that the averment should be of fact and not of evidence. So in this case, our declaration avers as a matter of fact, that a certain contract was made by these parties. When we come to *prove the averment*, we are obliged to show a valid contract, and do so by showing a delivery and acceptance of a part of the goods.

Suppose instead of claiming the contract valid by reason of the delivery of the labels, we had claimed it

valid by reason of the delivery and acceptance of a barrel of the whiskey. Now, while if our bill of particulars only charged for nine of the ten barrels, the Court would exclude evidence of the delivery of the tenth barrel, for the purpose of allowing a recovery for *it*, yet evidence of its delivery and acceptance would be allowed for the purpose of showing a validcontract for the *nine*, which were charged for in the bill of particulars.

1 Chitty, pl. 303, and cases cited.

By Chitty the rule is stated thus: "Where, by the "statute of frauds the promise is ineffectual unless there "be a memorandum of its terms in writing, it is not "necessary in a declaration at law, or a bill in equity, "to show that the requisites of the statute have been "complied with. * * * And it would seem, that the "statute only affects the rules of evidence and not of "pleading."

Any other rule would be somewhat absurd, for the part of the purchase delivered, may be of the slightest quantity.

Morton vs. Tibbett, 15 Q. B., 428, was a case, where a cargo of wheat had been contracted for, and a mere sample delivered and accepted; the question was, whether there was such a delivery and acceptance as took the case out of the statute of frauds. Lord Campbell in delivering judgment, said: "*as part payment, however minute the same may be, is sufficient, so part delivery, however minute the portion may be, is sufficient.*"

Benjamin says: "The question presented to the "Court may be whether there was a contract, or it may "be whether the contract was fulfilled. It is sufficient to "show an acceptance and actual receipt of a part, how-"ever small, of the thing sold, in order that the contract "may be allowed to be good, and yet the purchaser may "well refuse to accept the delivery of the bulk, not be-"cause there is not a valid contract proven, but because "the vendor fails to comply with the contract as "proven."

Benjamin on Sales, 112.

We think therefore it is absurd to say that the evidence of the delivery and acceptance of the labels was wrongly admitted, because not mentioned in the bill of particulars.

II.

Did the Court then err in submitting to the jury the question of whether there had been a receipt and acceptance of part of the goods sold?

It is true that the labels were an incident to the liquors sold. They were such an incident as the gold setting of a precious stone might be to the thing sold. If the stone were a diamond set in gold, the contract would recognize the value of the setting while it might name naught but the diamond. The setting would be as much a part of the thing contracted for (though not as material), as the stone itself. Suppose for convenience or safety, the stone should be taken from the setting, and the setting delivered and accepted with an invoice of the thing purchased, viz: one diamond necklace; can there be any doubt that the Statute would be held to be satisfied?

The labels were peculiar, valuable, copyrighted, and were contracted for as part of the thing sold and the furnishing of which were a condition of the sale.

Coleridge, *J.*, in Bushel vs. Wheeler, 15, Q. B., 442, says: "It is a question for the jury, whether under all the circumstances, the acts which the buyer does or forbears to do, amounts to an acceptance."

Denman, *C. J.*, in Eden vs. Dudfield, 1 Q. B, 302, says, that the question of acceptance is one "of facts for the jury, and not one of law for the Courts."

3 Parsons on Cont. (5 Ed.) 41–42.

In Gray, v. Davis, (10 N. Y., 285), the rule is stated thus: "Upon a sale of personal property, any acts of

"the parties indicative of the exercise of ownership by "the vendee may be submitted to the jury as evidence "of receipt and acceptance, to take the case out of "the Statute of frauds."

It should be borne in mind when considering the charge of the Court upon this question, of the delivery and acceptance of a part of the goods, and as bearing upon the intent of the parties at the time, as considered by the jury, that it appeared affirmatively that all the goods were accepted and received according to contract, without objection then or ever, and were disposed of by plaintiffs in error; and that with the labels in New York, were delivered a bill of the items purchased with a statement of the terms of the contract.

Mills vs. Hunt, (20 Wend., 431,) was a case, where several parcels of goods were purchased on distinct and separate bids, to be paid for in a note at a future day. A bill of parcels was delivered, and some of the parcels, but not all. *Held*, that the contract was entire, and that under the circumstances the delivery of some of the parcels took the case out of the statute. The Court says: "The bill of parcels, which was delivered in this case, "although it does not upon its face contain the necessary "requisites to take the case out of the statute of frauds "as a written contract for the sale and delivery of the "goods, is still to be regarded as evidence that the "several articles were considered by the vendors as em- "bracing one contract. * * * *A delivery of part of "the articles so purchased, without any objections at the time "as to the delivery of the residue, is sufficient to take the sale "out of the statute, as to the whole of the goods so purchased.*"

III.

It is true that some cases have laid down the rule, that the acceptance and receipt such as to take the case out of the statute must be such an acceptance and receipt as would preclude the buyer from making

any objection as to the quality and quantity of the goods.

While we question this rule, and while the later English cases have held directly the other way, none of the cases cited by counsel go the length of applying such a rule to any goods except such *part* as is claimed to have been accepted and received. In other words, no case can be found which holds that an acceptance and receipt of part of the goods sold such as to take the case out of the statute will preclude the buyer from objection and rejection of the remainder of the goods on opportunity for inspection.

It is true there are some dicta which would seem to sanction such an interpretation, but the statute itself in providing that an acceptance of a *part* shall be as effective to bind the bargain, so as to let in evidence of its terms, as the payment of earnest money, could not mean that the acceptance should be of the whole.

To show that the cases mean nothing more than that the acceptance and receipt of the part would be such as to preclude examination and objection as to that part, we need only refer to cases holding—

"That the acceptance of part of the goods bought "makes the contract good for the whole, even in cases "where some of the goods are not yet in existence, but "are to be manufactured." (Benj. on Sales, 123.)

Scott *vs.* Eastern Railway Company, 12 M. and W. 33, was a contract for a number of lamps. Some were delivered and others not ready for two years after. The Courts held the contract entire, and the acceptance and receipt of part made the contract valid under the statute of frauds.

Same point on an order for common steel and cast steel.

Elliot *vs.* Thomas, 3 M. & W., 176.

In Chitty on Cont. 383, he rule is laid down as follows: "If there be a joint order for *several classes* of goods the

"acceptance of one class would be an acceptance of the "whole within the statute of frauds."

To same point a to contracts for different classes of goods.

See Story on Contracts, Sec. 1,015.
Rohde *vs.* Thwaite, 6 B. & C. 388.
12 M. & W. 38.
20 Wend. Supra.
Benjamin on Sales, 124.

Says Benjamin, "The effect of the acceptance and "actual receipt of the goods, *or part of them*, is to prove "that there was a contract of sale, and this effect is pro- "duced although there may be a dispute between the "parties as to the terms of the contract. Such dispute "is to be determined on the parol evidence as all other "questions of fact by the jury," and so expressly decided in *Tomlinson vs. Straight*, 17, C. B. 697.

But the true rule is that the acceptance and receipt contemplated by the statute of frauds is not such a receipt and acceptance as precludes examination and objection to the goods. If that were the rule, why should not the payments of earnest money, or the signing of a memorandum of the contract have the same effect? The present law in England is laid down by *Lord Campbell* in Morton *vs.* Tibbetts, 15 Q., B. 428. After refering to cases holding the doctrine contended for by plaintiffs in error, he says: "Judges as well as counsel, have sup- "posed that, to dispense with a written memorandum of "the bargain, there must first have been a receipt of the "goods by the buyer, and after that an actual acceptance "of the same. *Hence perhaps has arisen the notion that "there must have been such an acceptance as would pre- "clude the buyer from questioning the quantity or "quality of the goods, or in any way disputing that the "contract has been fully performed by the vendors.*"

"But the language of the section is (here states the "whole of the section in question of the statute of frauds). "It is remarkable that notwithstanding the importance

"of having a written memorandum of the bargain, the "legislature appears to have been willing that this might "be dispensed with, when by mutual consent there has "been part performance. Hence the payment of any "sum in earnest to bind the bargain is sufficient. *The "same effect is given to the corresponding act by the vendors "of delivering parts of the goods sold to the buyer, if the "buyer accept such part, and actually receive the same.* "As part payment, however minute, is sufficient, so part "delivery, however minute, is sufficient. *This shows con-"clusively that the condition imposed was not the complete "fulfillment of the contract to the satisfaction of the buyers.*" "In truth the fulfilling of the condition, is merely to "waive written evidence of the contract and to allow "the contract to be established by parol as before the "statute of frauds. * * As the act of parliament ex-"pressly makes the acceptance and receipt of any part "of the goods sold sufficient *it must be open to the buyers "at all events to object to the quantity and quality of the resi-"due.* * * The acceptance to let in parol evidence appears "to us to be a different acceptance from that which af-"fords conclusive evidence of the contract having been "fulfilled."

The cases cited by plaintiffs in error do not establish any other doctrine. In 44 N. Y. 665 Cross vs. O'Donnell.

The Court says: "It is said by some writers, that to "create such an appropriation of the goods by the buyers "as will answer the meaning of the words 'accept and "receive' of the statute, there must be such an actual "delivery by the seller, as will destroy all lien for the "purchase price or right of *stoppage in transitu*. This, "to the full extent is not true. The contracts of sale "may be in writing, part of the purchase money may "have been paid, *and there may have been a part delivery*, "and yet if the seller consigns the goods by a carrier "to the buyer, the right of stoppage exists."

But the New York cases have held over and over again that a part delivery takes the sale out of the

statute in cases where it would be absurd to say that the partial delivery took away the right of objection as to the residue.

Van Want vs. Railroad, 67 N. Y. 538, is a case citing the leading cases, and is itself a case where the partial delivery was made when some of the merchandise was not in existance.

IV.

The charge of the Court, that this was a defence not favored in the law, was correct. The Court expressly tells the jury however, that prejudices for or against the law, should not move them. Folio 70.

The charge to the jury is to be construed together as a whole, and a complaint of a portion of it standing alone would bear a construction which might mislead the jury, but considered with the rest would not be likely to, will not be sustained.

Daniels vs. Clegg, 28 Mich., 32,
McGinnis v. Kempsey, 27 Mich., 363, 32 Mich. 77, Ib. 246.

There is no intimation in the charge which is not legitimate. The jury, in finding the receipt and acceptance *of the liquors* in New York, fell into the error of construing the Statute of frauds, (as counsel does,) that the receipt and acceptance of a part of the thing sold, was necessarily a receipt and acceptance of the whole.

V.

The only defense raised on this record, or which could ever be made on a new trial, is that the sale was void under the Michigan statute.

That statute was repealed by the act of the legislature of Michigan, approved May 3, 1875.

Laws of Mich., 1875, p. 274.

The Repealing Statute did not reserve this defense, and reserved nothing under the old act save actions and causes of action pending for penalties.

The law is perfectly well settled that the repeal of a statute which made a contract illegal on grounds of public policy leaves contracts entered into in violation of it valid.

See cases cited 5 Abbot, N. Y., Dig. (new Ed.,) 605. Where the law is changed pending the proceedings, judgment must be pronounced according to the law as it then is.

Cooley's Const., Lim. 362. 375 note 2
Bank *vs.* Dudley, 2 Pet. 482.
5 Cranch, 281.
6 Cranch, 329.
11 Pick, 350.
21 Pick, 373.
21 N. Y., 99.
29 Conn, 272.

by these cases it will be seen that the doctrine has been applied in the Appellate Court.

We submit, also, irrespective of the label question, this case is of the same character as where the Appellate Courts have held on inspection of the whole record that a second trial could reach no other result.

For the reasons: (1), That the liquor law is repealed. (2,) because the case is one which must be held to be without the Statute of frauds, because to urge the Statute would be a fraud, and plaintiffs, by taking the benefits of it cannot be allowed to repudiate the contract.

And (3), by the subsequent letter recognizing the contract the case was taken out of the Statute.

See record, folio 46 and 47.

Webster v. Zilley, 52 Barb., 182.

Gale v. Nixon, 6 Cow., 445.

Thompson v. Alger, 12 Met., 435 3 Ad and El., 355.

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